(28,383)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 408.

ST. LOUIS COTTON COMPRESS COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF ARKANSAS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

INDEX.

	Original.	Print.
Præcipe for record	1	1
Transcript of record from the Pulaski circuit court	2	1
Præcipe	1	1
Complaint	2	1
Answer	8	4
Demurrer	9	5
Judgment, circuit court	10	5
Judgment, supreme court, reversing the cause	12	6
Opinion, supreme court	14	7
Mandate	20	10
Agreed statement of facts	22	11
Judgment, circuit court	25	12
Motion for new trial	27	13
Order overruling motion for new trial and granting appeal	28	13
Certificate of clerk	29	14
Assignment of errors	30	14
Petition for writ of error	32	15
Bond on writ of error	34	17
Writ of error	38	20
Certificate of lodgment	40	21
Citation	41	21
Return to writ of error	42	22

Byron S. Adams & Detweiler (Inc.), Printers, Washington, D. C., October 4, 1921.

1 In the Supreme Court of the United States.

ST. LOUIS COTTON COMPRESS COMPANY, Plaintiff in Error,

vs.

STATE OF ARKANSAS, Defendant in Error.

Præcepe.

To the Clerk of the Supreme Court of the State of Arkansas:

You will include in the record to be attached to the writ of error in the above entitled cause, the following papers: The complaint; the answer; the demurrer; the judgment of the lower court on the first appeal; the judgment of this court reversing the cause on the first appeal; the opinion of this court on the first appeal; the mandate; the agreed statement of facts, filed in the lower court; the judgment in the lower court; the motion for new trial; and the order overruling the motion for new trial and granting the appeal.

ST. LOUIS COTTON COMPRESS COMPANY,
By ROSE, HEMINGWAY, CANTRELL & LOUGHBOROUGH,
Attorneys.

2 In the Pulaski Circuit Court.

STATE OF ARKANSAS ex Rel. JOHN D. ARBUCKLE, Attorney General, and Bruce T. Bullion, Insurance Commissioner of the State of Arkansas, Plaintiffs,

vs.

THE ST. LOUIS COTTON COMPRESS COMPANY, Defendant.

Complaint.

The State of Arkansas on the relation of Jno. D. Arbuckle, Attorney General, and Bruce T. Bullion, Insurance Commissioner of the State of Arkansas by F. G. Lindsey, his attorney, for cause of action against the defendant allege that Bruce T. Bullion is the duly commissioned, qualified and acting Insurance Commissioner of the State of Arkansas and that the defendant, The St. Louis Cotton Compress Company, is a foreign corporation organized under and by virtue of the laws of the State of Missouri on the 28th day of July, 1873, with its domicile, principal place of business and general office in the city of St. Louis, Missouri, for the purpose of storing and compressing cotton and to do a general storage business and to purchase and to hold such real estate as was necessary to conduct the business of said company.

That said defendant complied with the requirements of the laws of the State of Arkansas permitting and authorizing foreign corporations to transact business in the State and procured a
3 proper certificate of authority from the Secretary of the State of Arkansas to do business in the said State and did enter said State of Arkansas by virtue of the laws of said State and said certificate aforesaid on the 2nd day of November, 1895, and the defendant is now and has been continuously since said date engaged in operating and conducting a general storage business for the purpose of storing and compressing cotton in the State of Arkansas and has maintained, operated and conducted and is now maintaining, operating and conducting its business in the cities of Little Rock and Argenta, Pulaski County, Arkansas, Pine Bluff, Jefferson County, Arkansas, Newport, Jackson County, Arkansas, El Dorado, Union County, Arkansas, and McGehee, Desha County, Arkansas, and owns real estate and machinery, compresses and warehouses at each of the above named places and that the defendant insured its property located in this State in the year 1913, in the following named foreign Fire Insurance Companies, to-wit:

Ohio Miller;
Pacific Fire,
City Insurance Company of Pittsburg;
National Fire and Marine Under-Writers;
National Fire Insurance Under-Writers;
Legal Insurance Company;
Central Insurance Company;
New Sub-Lloyds,

at and for the sum of Three hundred thousand ($300,000.00) dollars and paid to said Companies as gross premiums for said Insurance policies the sum of Seven thousand five hundred ($7,500.00)
4 dollars.

That said defendant insured all of its property located in this State at the above named cities and towns in the above named Fire Insurance Companies in the year 1914, at and for the sum of three hundred thousand ($300,000.00) dollars, and paid the said Companies for said insurance policies as gross premiums for said insurance policies, the sum of seven thousand five hundred ($7,500.00) dollars.

That said defendant insured all of its property located in this State at the above named cities and towns in the above named Fire Insurance Companies in the year 1915, at and for the sum of Three hundred thousand ($300,000.00) dollars, and paid the said Fire Insurance Companies as gross premiums for said insurance policies the sum of Seven thousand five hundred ($7,500.00) dollars.

That said defendant insured all of its property located in this State at the above named cities and towns in the above named Fire Insurance Companies for the year 1916, at and for the sum of Three hundred fifty thousand ($350,000.00) dollars, and paid the said Insurance Companies as gross premiums for said insurance

policies the sum of Eight thousand seven hundred fifty ($8,750.00) dollars.

That said defendant insured all of its property located in this State at the above named cities and towns aforesaid and in the above named Insurance Companies for the year 1917, at and for the sum of Three hundred fifty thousand ($350,000.00) dollars and paid to said Companies as gross premiums for said insurance policies the sum of Eight thousand seven hundred fifty ($8,750.00) dollars.

That said defendant insured all of its property located in this State at the above named nities and towns aforesaid in the above named Fire Insurance Companies aforesaid in the year 1918, at and for the sum of Three hundred fifty thousand ($350,000.00) dollars, and paid to said Fire Insurance Companies as gross premiums for said insurance policies the sum of eight thousand seven hundred fifty ($8,750.00) dollars.

That said defendant insured all of its property located in this State at the above named cities and towns aforesaid in the above named Fire Insurance Companies in the year 1919, at and for the sum of Three hundred fifty thousand ($350,000.00) dollars, and paid to said Fire Insurance Companies as gross premiums for said insurance policies the sum of Eight thousand seven hundred fifty ($8,750.00) dollars.

That none of the above named Fire Insurance Companies aforesaid, were authorized to do business in the State of Arkansas at the time of writing and issuing said insurance policies and each of them has failed to comply with the insurance laws of the State of Arkansas and to procure license or certificate of authority from the Insurance Commissioner of the State of Arkansas authorizing them to do business and to write insurance in the State of Arkansas and that none of said Companies is authorized to do business in this State.

That the defendant was and is required under Section 1 Act 159, of the General Assembly, of the State of Arkansas, approved March 12th, 1913, to file with the Insurance Commissioner of the State on or before the first day of March of each year a sworn affidavit of the amount of premiums, paid to unauthorized Insurance Companies and shall pay into the State Treasurer a tax of 5 per centum of the gross premiums paid thereon.

That the defendant has for each and all the years aforesaid, failed, neglected and refused to make out, deliver and file such sworn affidavit with the Insurance Commissioner of the State on or before the first day of March of each year as required by said Act and has failed, neglected and refused to pay into the State Treasurer a tax of 5 per centum on the gross premiums paid for said insurance as required by law.

The plaintiffs allege that the amount of tax due the State of Arkansas by the defendant on the gross premiums paid as aforesaid, to said Insurance Companies aforesaid, for the year 1913, is Three hundred seventy five ($375.00) dollars, for the year 1914, Three Hundred seventy five ($375.00) dollars, for the year 1915, Three hundred seventy five ($375.00) dollars, for the year 1916, Four

hundred thirty seven dollars fifty cents ($437.50) for the year 1917, four hundred thirty seven dollars fifty cents ($437.50) for the year 1918, four hundred thirty seven dollars fifty cents ($437.50) and the year 1919, four hundred thirty seven dollars fifty cents ($437.50) and aggregating the sum of Two thousand eight hundred seventy five ($2,875.00) dollars and that said sum of money is past due and unpaid.

7 Wherefore, the premises being considered the plaintiffs pay judgment against the defendant for the sum of Two thousand eight hundred seventy five ($2,875.00) dollars and cost of suit.

JNO. D. ARBUCKLE,
Attorney General State of Arkansas.
F. G. LINDSEY,
Atty. for Bruce T. Bullion,
Insurance Commissioner of State of Arkansas.

Endorsed: Filed and Summons issued Aug. 16, 1920. J. E. Chrisp, Circuit Clerk, by O. L. McNair, D. C.

Return of Sheriff shows service on F. H. Good, Superintendent, Agent and employee of said defendant company, he being in charge of the office and place of business maintained and kept by the defendant, The St. Louis Cotton Compress Company, in the City of Little Rock, Pulaski County, Arkansas.

8 In the Pulaski Circuit Court.

STATE OF ARKANSAS ex Rel. JOHN D. ARBUCKLE, Attorney General, et al., Plaintiffs,

vs.

ST. LOUIS COTTON COMPRESS COMPANY, Defendant.

Answer.

The insurance taken out by the defendant upon its property in Arkansas was taken out by it at its domicile in the city of St. Louis, State of Missouri, where the policies were contracted for, where they were delivered, where they were paid for; and where they were payable; and said insurance was taken out by the defendants in the State of Missouri, for the reason that the rates of premium charged were 15% lower than were charged by companies authorized to do business in the State of Arkansas. Long before the passage of the statute relied upon herein the defendant had made large investments in Arkansas in real and personal property essential to the conduct of its business which it has held and operated ever since.

ROSE, HEMINGWAY, CANTRELL & LOUGHBOROUGH.

(Endorsed:) Filed Sep. 4, 1920. J. E. Chrisp, Circuit Clerk, by A. W. Johnson, D. C.

9 In the Pulaski Circuit Court.

STATE OF ARKANSAS ex Rel. JOHN D. ARBUCKLE, Attorney General, et al., Plaintiffs,

VS.

ST. LOUIS COTTON COMPRESS COMPANY, Defendant.

Demurrer to Answer.

Now come the plaintiffs and demur herein to the answer of the defendant because it does not state facts sufficient to constitute a defense to plaintiffs' complaint herein.

JOHN D. ARBUCKLE,
Attorney General, and
F. G. LINDSEY,
Attorney for Plaintiffs.

(Endorsed:) "Filed Oct. 15, 1920. J. E. Chrisp, Circuit Clerk, by John M. Shackleford, D. C.

10 Pulaski Circuit Court, Third Division, September Term, 1920.

Friday, October 29, 1920.

STATE OF ARKANSAS ex Rel. JOHN D. ARBUCKLE, Attorney General, and Bruce T. Bullion, Insurance Commissioner of the State of Arkansas, Plaintiffs,

VS.

THE ST. LOUIS COTTON COMPRESS COMPANY, Defendant.

On this day comes the plaintiff, State of Arkansas, Ex Rel., John D. Arbuckle, Attorney General, and Bruce T. Bullion, Insurance Commissioner of the State of Arkansas, by their attorneys, John D. Arbuckle, Attorney General and F. G. Lindsey, Esqr., and comes the defendant, St. Louis Cotton Compress Company, by its attorneys, Rose, Hemingway, Cantrell & Loughborough, and comes on for hearing the demurrer of the plaintiffs to the answer of the defendant, same is submitted to the Court after argument of counsel, and the Court being well and sufficiently advised as to the law, doth overrule said demurrer.

To which action of the Court in overruling said demurrer the plaintiffs at the time excepted and asked that their exceptions be noted of record which is hereby done.

Whereupon plaintiffs elected to stand on their demurrer and moved for judgment as prayed for in their complaint, which motion was by the Court denied, and the Court thereupon dismissed plaintiff's complaint.

11 It is, therefore, considered, ordered and adjudged by the Court that the complaint of the plaintiffs herein be dismissed, and that the defendant have and recover of and from the plaintiffs all its costs laid out and expended herein.

To which ruling of the Court in overruling plaintiffs' demurrer and denying plaintiffs' motion for judgment and dismissing plaintiffs' cause of action the plaintiffs at the time excepted to the action of the Court and asked that their exceptions be noted of record, which is hereby done.

Thereupon the plaintiffs prayed an appeal to the Supreme Court of Arkansas, which is by the Court granted.

12 STATE OF ARKANSAS, *ss:*

In the Supreme Court.

Be it remembered, That at a term of the Supreme Court of the State of Arkansas, begun and held on the 22nd day, being the fourth Monday of November, A. D. 1920, at the Courthouse, in the City of Little Rock, the following proceedings were had, to-wit: On the 14th day of February, 1921, a day of said term:

THE STATE OF ARKANSAS ex Rel. JOHN D. ARBUCKLE, Attorney General, et al., Appellants,

v.

THE ST. LOUIS COTTON COMPRESS COMPANY, Appellee.

Appeal from Pulaski Circuit Court, Third Division.

This cause came on to be heard upon the transcript of the circuit court of Pulaski county, Third Division, and was argued by counsel, on consideration whereof it is the opinion of the Court that there is error in the proceedings and judgment of said circuit court in this cause, in this: The court erred in holding the statute -as unconstitutional and in rendering judgment in favor of the appellee.

It is therefore considered by the Court that the judgment of said circuit court in this cause rendered be, and the same is hereby, for the error aforesaid, reversed, annul-ed and set aside with costs, and that this cause be remanded to said circuit court for a new trial, and for further proceedings to be therein had according to law, and not inconsistent with the opinion herein delivered.

13 It is further considered that said appellants recover of said appellee all their costs in this Court in this cause expended, and have execution thereof.

14 In the Supreme Court of Arkansas, Feby. 14, 1921.

No. 169.

STATE OF ARKANSAS ex Rel. JOHN D. ARBUCKLE, Attorney General, et al.

vs.

THE ST. LOUIS COTTON COMPRESS CO.

Statement of Facts.

Appellants instituted this action in the circuit court against appellee to recover taxes alleged to be due by it to the State of Arkansas on premiums paid for insurance from corporations not authorized to do business in this State.

Appellee is a foreign corporation authorized to do business in this State and operates compress plants in several cities in the State of Arkansas. It owns real estate, warehouses, and compresses at each of the towns in which it does business. Appellee is a corporation organized under the laws of the State of Missouri and in that State entered into contracts of fire insurance with companies not authorized to do business in this State for the insurance of all its property situated in this State. It refused to pay the tax on gross premiums so paid as required by our statute. Hence this lawsuit.

The circuit court rendered judgment in favor of appellee and the same is here on appeal.

Opinion.

HART, *J.* (after stating the facts):

15 Sec. 9967 of Crawford & Moses Digest requires fire, and other insurance companies authorized to do business in this State, to pay a tax of two per cent per annum on their gross receipts after deducting return premiums and authorized re-insurance. This suit is based upon the provision of the act which, among other things, provides, "that any person, firm, corporation, individual or association doing business in this State securing indemnity contracts or policy of insurance from any person, firm, corporation, association or individual not authorized to do business in this State, shall, on or before the first day of March each year, file with the Auditor of State a sworn affidavit of the amount of premiums paid to such unauthorized persons, firms, associations or corporations, and shall pay into the State treasury a tax of 5 per centum of the gross premiums paid."

It is sought to uphold the decision of the circuit court on the ground that the act is unconstitutional and to support their contention counsel rely upon the cases of Allgeyer v. Louisiana, 165 U. S. 578; N. Y. Life Insurance Co. v. Head, 234 U. S. 149;

Provident Savings Life Assurance Society v. Commonwealth
Kentucky, 239 U. S. 103, and N. Y. Life Insurance Co. v. Dodg
246 U. S. 357.

In N. Y. Life Insurance Co. v. Head, supra, a resident of Ne
Mexico, while in the State of Missouri, borrowed from a New Yor
life insurance company, a foreign corporation, on a policy issued
him a sum of money and subsequently defaulted in the payme
of the interest on the loan and the premium on the insu
16 ance policy. The company settled under the terms of th
loan agreement and the laws of the State of New York. Th
beneficiary sued the company for the full amount of the policy ba
ing her right to relief under a statute of Missouri regulating loa
on policies of life insurance by the company issuing the policy. Th
Supreme Court of the United States held that a State may not exten
the operation of its statutes beyond its borders into the jurisdictio
of other States so as to destroy and impair the right of persons n
its citizens to make a contract not operative within its jurisdictio
and lawful in the State where made.

In Provident Savings Life Assurance Society v. Commonwealth
Kentucky, 239 U. S. 103, a suit was brought by the State against th
Insurance Company to recover a tax on premium receipts under th
State statute. The Company ceased to write insurance in the Stat
but continued to collect premiums on business already written b
refused to pay the tax on the premiums. The court said that th
continuance of insurance contracts on the lives of residents of th
State already written by the Company does not depend upon th
consent of the State; nor has the State the power to treat the me
continuance of the obligations of existing policies of insurance hel
by residents as the transaction of local business justifying the im
position of a privilege tax in the absence of actual conduct
business within the limits of the State. Therefore, the cou
17 held that the imposition of taxes on premiums collected
policies on residents of Kentucky in pursuance of the statut
of that State after the Company had ceased to do business therei
to be an unconstitutional exercise of power under the due proce
provision of the Fourteenth Amendment.

In N. Y. Life Insurance Co. v. Dodge, 246 U. S. 357, the cou
held that a statute of the State of Missouri governing a life insu
ance contract made locally between a resident citizen and a local
licensed foreign corporation, and prescribing how the net value
the policy should be applied to avoid forfeiture if the premium w
not paid, could not be extended so as to prevent the policy holde
while present in such State, and the Company from making an
carrying out a subsequent independent agreement in the Company
home State, pursuant to its laws whereby the policy is pledged
security for a loan and afterwards cancelled in satisfaction of th
indebtedness. The decision was placed upon the ground that to
hold would be an invasion of the citizen's liberty of contract und
the Fourteenth Amendment and could not be sustained.

These cases would be applicable to the present case if the statu
had required the tax in question to be paid by the foreign insuran

company. No such attempt is made by the statute and we do not regard the cases as controlling under the facts as disclosed by the record.

18 In Allgeyer v. Louisiana, 165 U. S. 578, a citizen and resident of Louisiana made in New York with a corporation doing business there, a contract for Marine Insurance to cover cotton to be purchased and shipped. Allgeyer mailed in Louisiana a letter addressed to New York City reporting the shipments as required by the contract. Under the Louisiana statute it was a crime for any one to do any act to affect insurance in any marine insurance company which had not established a place of business within the State and appointed an agent upon whom process might be served. The insurance company had not been authorized to do business in Louisiana and did no business there. Allgeyer was convicted of mailing the latter and the Supreme Court of the United States held that the statute was unconstitutional as considered by the State Court because it denied to citizens of the United States rights guaranteed by the Fourteenth Amendment.

We do not think that case furnishes any support to the contention of counsel for appellee. The court said that the statute in question was not due process of law because it prohibited an act which, under the Federal Constitution, Allgeyer had a right to perform. The court further said, however, that this did not interfere in any way with the acknowledged right of the State to enact such legislation in the legitimate exercise of its power as it may *seem* proper. No attempt is made under the present statute to interfere with the freedom of contract between the appellee and foreign

19 insurance companies which are not carrying on business in this State. Appellee had a perfect right to make the contracts of insurance without the State of Arkansas. Its right to do so is not affected or questioned by this decision. The question presented for our determination is whether or not the statute requiring persons, firms, or corporations doing business in this State to pay into the State Treasury a tax of 5% of the gross premiums paid by it to corporations or associations not authorized to do business in this State for policies of insurance on its property in this State is a valid one. Appellee is a foreign corporation and in any event the statute is valid in so far as it is concerned. The legislature has complete control over corporations and can create them or permit them to do business in this State upon such terms as it deems proper. The legislature had the power to prescribe terms upon which foreign corporations might do business in this State as well as domestic corporations which it brings into existence and therefore had the power to lay this imposition upon appellee as an occupation tax. State ex rel. v. N. Y. Life Insurance Co. 119 Ark 314.

The judgment of the circuit court holding the statute unconstitutional was wrong. Therefore, the judgment must be reversed and the cause will be remanded for further proceedings according to law.

20 Pulaski Circuit Court, Third Division, March Term, 1921.

Friday, April 8, 1921.

13953.

STATE OF ARKANSAS ex Rel. JOHN D. ARBUCKEL, Attorney General, and Bruce T. Bullion, Insurance Commissioner of the State of Arkansas, Plaintiffs,

VS.

THE ST. LOUIS COTTON COMPRESS COMPANY, Defendant.

On this day is filed herein, by leave of the Court, a Mandate from the Supreme Court of the State of Arkansas, in the above entitled cause, which Mandate is in words and figures as follows, to-wit:

"STATE OF ARKANSAS, *sct:*

In the Supreme Court.

Be it remembered, That at a term of the Supreme Court of the State of Arkansas, begun and held at the Court House in the City of Little Rock, on the — day, being the fourth Monday of November, A. D. 1920, amongst others were the following proceedings, on the 14th day of February, A. D. 1921, a day of said term:

THE STATE OF ARKANSAS ex Rel. JOHN D. ARBUCKLE, Attorney General, et al., Appellants,

VS.

THE ST. LOUIS COTTON COMPRESS CO., Appellee.

Appeal from Pulaski Circuit Court, Third Division.

This cause came on to be heard upon the transcript of the
21 record of the circuit court of Pulaski county, Third Division, and was argued by counsel, on consideration whereof it is the opinion of the Court that there is error in the proceedings and judgment of said circuit court in this cause, in this:

The Court erred in holding the statute as unconstitutional and in rendering judgment in favor of the appellee.

It is therefore, considered by the Court that the judgment of said circuit court in this cause rendered be, and the same is hereby, for the error aforesaid, reversed, annulled and set aside with costs, and that this cause be remanded to said circuit court for a new trial, and for further proceedings to be therein had according to law, and not inconsistent with the opinion herein delivered.

It is further considered that said Appellants recover of said Appellee all their costs in this Court in this cause expended, and have execution thereof.

In testimony, That the above is a true copy of the decree of said Supreme Court rendered in the case therein stated, I, W. P. Sadler, Clerk of said Supreme Court, hereunto set my hand and affix the Seal of said Supreme Court, at my office in the City of Little Rock, this 7th day of April, 1921.

W. P. SADLER,
Clerk."

22 In the Pulaski Circuit Court.

STATE OF ARKANSAS ex Rel. JNO. D. ARBUCKLE, Attorney General, and Bruce T. Bullion, Insurance Commissioner of the State of Arkansas, Plaintiffs,

VS.

THE ST. LOUIS COTTON COMPRESS COMPANY, Defendant.

Agreed Statement of Facts.

It is agreed that Bruce T. Bullion is Insurance Commissioner of the State of Arkansas; that the St. Louis Cotton Compress Company is a corporation organized under the laws of the State of Missouri; that its principal place of business is in the City of St. Louis, Missouri; that it is authorized to transact business in the State of Arkansas as a foreign corporation; that it has been doing business in the State of Arkansas since November, 1895; and that prior to the passage of the act under which this suit is brought it had made large investments in real and personal property in the State of Arkansas and had established a number of cotton compressing plants which it has been operating ever since; that it conducts a storage business and cotton compressing business in the State of Arkansas at all the places mentioned in the complaint of plaintiff in said State; that none of the Insurance Companies mentioned in plaintiffs' complaint are authorized to transact business in the State of Arkansas; that the defendant, St. Louis cotton Compress Company at its home office in St. Louis, Missouri, insured all its prop-
23 erty located in the state of Arkansas in the unauthorized insurance companies as alleged by the plaintiffs in their complaint at the time and dates and for the amounts as claimed by plaintiff in the allegations of their complaint; said policies being issued in Missouri and payable there; and that it paid as premiums to the said unauthorized insurance companies in the State of Missouri the amounts as alleged by plaintiffs and at the time which were less than the premiums charged in Arkansas; and that defendant has failed, neglected and refused to make out and deliver and file with the insurance commissioner a sworn affidavit of the amount of premiums paid to unauthorized insurance companies on or before the first day of March of each year, and has failed, neglected and refused to pay into the State Treasury a tax of five per centum on the gross premiums paid to said unauthorized insurance companies as alleged by plaintiffs in their complaint.

That the amount of 5 per cent tax on the gross premiums paid by

defendant to said unauthorized insurance companies for the yea
1913 to 1919 inclusive is the sum of Two Thousand Eight Hundre
and Seventy Five ($2,875.00) Dollars, and that said sum of mone
is wholly unpaid, and that the aggregate amount of interest on th
said unpaid taxes is the sum of Eight Hundred and Fifty Nine an
14/100 ($859.14) Dollars, and that the aggregate amount of sai
unpaid taxes and interest thereon as claimed by the plaintiff, is th
sum of Three Thousand Seven Hundred and Thirty Four & 14/10
($3,734.14) Dollars.

It is stipulated and agreed between plaintiff and defendan
24 that the foregoing agreed statement of facts may be filed i
this cause and used as the evidence in the trial of said caus
in the above named Court.

This the 12th day of April, A. D. 1921.

STATE OF ARKANSAS AND
BRUCE T. BULLION,
Insurance Commissioner,
By J. S. UTLEY,
Attorney General, and
F. G. LINDSEY,
Attys.
ST. LOUIS COTTON COMPRESS CO.,
By ROSE, HEMINGWAY, CANTRELL &
LOUGHBOROUGH,
Attorneys for Defendant.

25 Pulaski Circuit Court, Third Division, March Term, 1921

Wednesday, April 13, 1921.

13953.

STATE OF ARKANSAS ex Rel. JOHN D. ARBUCKLE, Attorney General and Bruce T. Bullion, Insurance Commissioner of the State of Arkansas, Plaintiffs,

vs.

THE ST. LOUIS COTTON COMPRESS CO., Defendant.

Now on this day this cause comes on to be heard and the plaintiffs, appearing by their attorneys, J. S. Utley, Attorney General, and F. G. Lindsey, and the defendant appearing by its attorney, Geo. B. Rose, and the cause being submitted to the Court sitting as a jury by consent upon the mandate of the Supreme Court filed and spread of record in this Court, and the complaint of the plaintiff, the answer of the defendant and the agreed statement of facts as the evidence in the cause; and the Court, after duly considering the same, doth find that the defendant, the St. Louis Cotton Compress Company, is justly indebted to the plaintiffs in the sum of Two Thousand Eight Hundred and Seventy Five ($2,875.00) Dollars, as alleged by them in their complaint, and the sum of Eight Hundred and Fifty Nine Dollars and Fourteen Cents ($859.14) as

interest, and in the aggregate amount of Three Thousand Seven Hundred and Thirty Four and 14/100 ($3,734.14) Dollars, and should have judgment for the same.

It is, therefore, considered and adjudged by the Court that
26 the plaintiff, the State of Arkansas, do have and recover of and from the St. Louis Cotton Compress Company, the defendant herein, the sum of Three Thousand Seven Hundred and Thirty Four and 14/100 ($3,734.14) Dollars, and all costs laid out and expended herein.

27 In the Pulaski Circuit Court.

STATE OF ARKANSAS on the Relation of J. S. UTLEY, Attorney General, Plaintiff,

VS.

ST. LOUIS COTTON COMPRESS COMPANY, Defendant.

Motion for New Trial.

The defendant moves for a new trial herein because it says:

First. The Court erred in refusing the declaration of law asked by the defendant.

Second. The Court erred in rendering judgment in favor of the plaintiff on the agreed statement of facts.

ROSE, HEMINGWAY, CANTRELL & LOUGHBOROUGH,
Attorneys for Defendant.

28 Pulaski Circuit Court, Third Division, March Term, 1921.

Wednesday, April 13, 1921.

13953.

STATE OF ARKANSAS ex Rel. JNO. D. ARBUCKLE, Attorney General, and Bruce T. Bullion, Insurance Commissioner, of the State of Arkansas, Plaintiffs,

VS.

THE ST. LOUIS COTTON COMPRESS COMPANY, Defendant.

On this day come the plaintiffs, State of Arkansas, Ex Rel. John D. Arbuckle, Attorney General, and Bruce T. Bullion, Insurance Commissioner of the State of Arkansas, by their attorneys, J. S. Utley, Attorney General, and F. G. Lindsey, Es., and comes the defendant, The St. Louis Cotton Compress Company, by its attorneys, Rose, Hemingway, Cantrell & Loughborough, and comes on for hearing the motion for a new trial of the defendant, The St. Louis Cotton Compress Company, same is submitted to the Court after argu-

ment of counsel; and the Court, being well and sufficiently advised, doth overrule said motion.

To which action of the Court in overruling said motion for a new trial the defendant at the time excepted and asked that its exception be noted of record, which is hereby accordingly done.

Thereupon, the defendant prayed an appeal to the Supreme Court of Arkansas, which was by the Court granted.

29 STATE OF ARKANSAS, *ss:*

Supreme Court.

I, W. P. Sadler, clerk of said court, do hereby certify that the foregoing is true, full and complete transcript of the record and proceedings in the case of St. Louis Cotton Compress Company, Appellant, vs. The State of Arkansas, Appellee, as called for by the præcipe hereto attached and made a part hereof.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Little Rock, Arkansas, this July 8th, 1921.

[Seal of the Supreme Court of Arkansas.]

W. P. SADLER,
Clerk Supreme Court of Arkansas.

30 In the Supreme Court of the United States.

ST. LOUIS COTTON COMPRESS COMPANY, Plaintiff in Error,

vs.

STATE OF ARKANSAS, Defendant in Error.

Assignment of Errors and Prayer for Reversal.

The said St. Louis Cotton Compress Company having filed its application for a writ of error to the Supreme Court of the United States from the judgment of the Supreme Court of the State of Arkansas, rendered on the 20th day of June, 1921, affirming the judgment of the Circuit Court of Pulaski County in the sum of $3,734.14, with costs, the said St. Louis Cotton Compress Company hereby assigns the following errors:

1. The Supreme Court of the State of Arkansas erred in not reversing said judgment, because of the error of the Circuit Court of Pulaski County in refusing the declaration of law asked by the petitioner, which was as follows:

"The statute on which this suit is based is void, because it is extra-territorial in its operation and attempts to control the action of parties beyond the borders of the State of Arkansas, and undertakes to deprive the defendant of the freedom of contract in other
31 States, guaranteed to it by the Constitution of the United States, and undertakes to deprive the defendant of its prop-

erty without due process of law, in violation of the Fourteenth Amendment of said Constitution."

2. The court erred in holding that the provision of Section 1 of Act #159 of the Statutes of Arkansas of the year 1913, requiring persons securing policies of insurance outside the State of Arkansas, upon property belonging to them in the State of Arkansas, to pay into the State Treasury a tax of five per centum of the gross premiums paid, was a valid enactment, which did not deprive the petitioner of its liberty of contract in other States, and that said statute did not deprive the petitioner of its property without due process of law, in contravention of the Fourteenth Amendment of the Constitution of the United States.

Your petitioner therefore prays that the judgment of the Supreme Court of the State of Arkansas, rendered in this cause on the 20th of June, 1921, be reversed and set aside.

ST. LOUIS COTTON COMPRESS COMPANY,
G. B. ROSE,
By ROSE, HEMINGWAY, CANTRELL & LOUGHBOROUGH,
Attorneys.

Filed July 7, 1921.
W. P. SADLER,
Clerk Supreme Court of Arkansas.

32 In the Supreme Court of the United States.

ST. LOUIS COTTON COMPRESS COMPANY, Plaintiff in Error,

vs.

STATE OF ARKANSAS, Defendant in Error.

Prayer for Writ of Error.

To the Honorable Edgar A. McCulloch, Chief Justice of the Supreme Court of the State of Arkansas:

Your petitioner, the St. Louis Cotton Compress Company, respectfully shows that the above entitled cause was a suit brought in the Circuit Court of Pulaski County for the recovery of five per cent of the premiums paid by the petitioner for policies of insurance taken out by it at its domicile in the State of Missouri, upon property owned and held by it in the State of Arkansas; that in said cause the judgment was in favor of your petitioner; but, on appeal therefrom, the judgment was reversed and the cause remanded for further proceedings in accordance with the opinion, and that, upon a trial in accordance with the opinion of this court, judgment was rendered against your petitioner in the sum of $3,734.14, from which your petitioner appealed to this court, where, on the 20th of June, 1921, final judgment was entered against your petitioner, affirming said

judgment of the Pulaski Circuit Court, in pursuance of Section 1 of Act #159 of the Acts of Arkansas of the year 1913.

33 In said cause it was contended by your petitioner that said statute was in violation of the Constitution of the United States in this, that it undertook to deprive your petitioner of the liberty of contract beyond the borders of the State of Arkansas, and that it deprived your petitioner of its property without due process of law, in violation of said Constitution and of the Fourteenth Amendment thereto; all of which will appear by a transcript of the proceedings in said cause herewith presented.

Your petitioner respectfully represents that in this cause the validity of said statute of the State of Arkansas was called in question, on the ground that it was repugnant to the Constitution of the United States, and the decision was in favor of the validity of said statute and against the claim asserted by your petitioner; that in this cause, rights, privileges and immunities were claimed by your petitioner under the constitution of the United States, and the decision of the Supreme Court of Arkansas was against the claim for such rights, privileges and immunities specially set up under said Constitution.

Your petitioner files herewith its assignment of errors, its prayer for reversal and its bond on writ of error, and prays that writ of error be allowed to the Supreme Court of the United States to review said judgment of the Supreme Court of the State of Arkansas affirming the judgment of the Circuit Court of Pulaski County, as above set forth.

ST. LOUIS COTTON COMPRESS COMPANY,
By G. B. ROSE,
ROSE, HEMINGWAY, CANTRELL & LOUGHBOROUGH,
Attorneys.

Let the writ of error issue upon execution of bond in sum of $3,734.14 to defendant in error—such bond when approved to act as a supersedeas, June 7, 1921.

E. A. McCULLOCH,
Chief Justice of the Supreme Court of Arkansas.

Filed July 7, 1921.

W. P. SADLER,
Clerk Supreme Court of Arkansas.

34 In the Supreme Court of the United States.

ST. LOUIS COTTON COMPRESS COMPANY, Plaintiff in Error,

vs.

STATE OF ARKANSAS, Defendant in Error.

Bond for Writ of Error.

Whereas, the undersigned, the St. Louis Cotton Compress Company, has sued out a writ of error to the Supreme Court of the United States to reverse a judgment rendered against it by the Supreme Court of Arkansas, on the 20th day of June, 1921, whereby a judgment of the Circuit Court of Pulaski County for the sum of $3,734.14 and costs was affirmed;

Now, therefore, the undersigned hereby undertake to the said State of Arkansas that the said St. Louis Cotton Compress Company shall prosecute its writ of error; and if it fails to make its plea good, shall answer all damages and costs and perform the judgment of the Supreme Court of the State of Arkansas and of the said Circuit Court of Pulaski County.

Witness our hands this 29th day of June, 1921.

ST. LOUIS COTTON COMPRESS COMPANY,
By JOSEPH W. LEWIS,
President.
FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
Surety,
By MARK CRAWLEY,
Attorney-in-fact.

Countersigned:
Little Rock, Arkansas.
FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
By C. O. BLACKWELL,
Attorney-in-fact.

Approved July 7, 1921.
E. A. McCULLOCH,
Chief Justice Supreme Court of Arkansas.

35 *Power of Attorney.*

Fidelity and Deposit Company of Maryland.

Home Office, Baltimore, Maryland.

Know all men by these presents:

That the Fidelity and Deposit Company of Maryland, by Fred S. Axtell, its Vice-President, and Wm. R. Bishop, its Assistant Secre-

tary, in pursuance of authority granted by Article VI, Section 3, of the By-Laws of said Company, a copy of which section is hereto attached, does hereby nominate, constitute and appoint Geo. R. Wendling Jr., and Mark Crawley, of the City of St. Louis, State of Missouri, each its true and lawful agent and attorney-in-fact, to make, execute, seal and deliver for and on its behalf as surety and as its act and deed, any and all bonds and undertakings.

It being understood that any bond executed under this power required in any state which has a resident agent's law, shall be countersigned by a licensed agent of the Company, residing in the state where the bond is required.

And the execution of such bonds or undertakings in pursuance of these presents, shall be as binding upon said Company, as fully and amply, to all intents and purposes, as if they had been duly executed and acknowledged by the regularly elected officers of the Company at its office in Baltimore, Maryland, in their own proper persons.

This power of attorney revokes those of August 1, 1914, in behalf of Geo. R. Wendling, Jr. and Mark Crawley, October 10, 1914 in behalf of John F. Lee, et al. October 10, 1914 in behalf of Geo. R. Wendling, Jr. and Mark Crawley and October 24, 1914 in
36 behalf of Geo. R. Wendling, Jr. and Mark Crawley.

In witness whereof, the said Fred S. Axtell, Vice President, and Wm. R. Bishop, Assistant Secretary, have hereunto subscribed their names and affixed the Corporate Seal of the said Fidelity and Deposit Company of Maryland, this 5th day of June, A. D. 1918.

Attest:

FIDELITY AND DEPOSIT COMPANY
OF MARYLAND,

(Signed) By FRED S. AXTELL,
Vice President.

[SEAL.] WM. R. BISHOP,
Assistant Secretary.

STATE OF MARYLAND,
City of Baltimore, ss:

On this 5th day of June, A. D. 1918, before the subscriber, a Notary Public of the State of Maryland, in and for the City of Baltimore, duly commissioned and qualified, came Fred S. Axtell, Vice President, and Wm. R. Bishop, Assistant Secretary, of the Fidelity and Deposit Company of Maryland, to me personally known to be the individuals and officers described in and who executed, the preceding instrument, and, they each acknowledged the execution of the same, and being by me duly sworn, severally and each for himself deposeth and saith, that they are the said officers of the Company aforesaid, and that the seal affixed to the preceding instrument is the Corporate Seal of said Company, and that the said Corporate Seal and their signature as such officers were duly affixed and subscribed to the said instrument by the authority and direction of the said Corporation.

In testimony whereof, I have hereunto set my hand and affixed my Official Seal, at the City of Baltimore, the day and year first above written.

[SEAL.] (Signed) E. BAYLEY BATES,
Notary Public.

37 *Extract from By-Laws of the Fidelity and Deposit Company of Maryland, Adopted by the Stockholders of said Company on January 19th, 1915.*

"Article VI, Section 3.—The President, or any of the Vice-Presidents, elected by ballot from the members of the Board of Directors shal have power by and with the concurrence of the Secretary or any one of the Assistant Secretaries or Additional Assistant Secretaries, to appoint any attorney-in-fact or to authorize any person to execute on behalf of the Company any bonds, recognizances, stipulations, undertakings, deeds, releases of mortgages, contracts, agreements and policies, and to affix the seal of the Company thereto."

I, Wm. R. Bishop, Assistant Secretary of the Fidelity and Deposit Company of Maryland, do hereby certify that the aforegoing is a true copy of Article VI, Section 3, of the By-Laws of said Company, and is still in force.

In testimony whereof, I have hereunto subscribed my name as Assistant Secretary, and affixed the Corporate Seal of the Fidelity and Deposit Company of Maryland, this 5th day of June, A. D. 1918.

(Signed) WM. R. BISHOP,
[SEAL.] *Assistant Secretary.*

Certificate.

I, W. A. Lauten, Assistant Secretary of the Fidelity and Deposit Company of Maryland, do hereby certify that the attached power of attorney dated June 5th, 1918, in behalf of Geo. R. Wendling, Jr. and Mark Crawley, of St. Louis, Mo., is a true and correct copy and that same is still in force.

In testimony whereof, I have hereunto subscribed my name and affixed the corporate seal of the said Company on Apr. 19, 1921.

W. A. LAUTEN,
Assistant Secretary.

Filed July 7, 1921.

W. P. SADLER,
Clerk Supreme Court of Arkansas.

38 In the Supreme Court of the United States.

ST. LOUIS COTTON COMPRESS COMPANY, Plaintiff in Error,
vs.
STATE OF ARKANSAS, Defendant in Error.

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Arkansas, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Arkansas before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had on the suit between the St. Louis Cotton Compress Company, as appellant, and the State of Arkansas, as appellee, wherein was drawn in question the validity of the tax imposed by Section 1 of Act #159 of the Statutes of the State of Arkansas of the year 1913, which provides that any person securing policies of insurance from any person, firm or corporation not authorized to do business in said State, shall pay a tax of five per cent (5%) of the gross premiums paid, on the ground that said statute is repugnant to the Constitution and laws of the United States, and the decision was in favor of its validity; and whereas in said suit there was drawn
39 in question the construction of a clause of the Constitution of the United States, and the decision of the Supreme Court of Arkansas was against the right, title, privilege and exemption specially set up and claimed under such clause of the Constitution of the United States; a manifest error has happened to the great damage of the said St. Louis Cotton Compress Company, as by its complaint appears; and we being willing that error, if any hath been done, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment therein has been given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable William H. Taft, Chief Justice of the Supreme Court of the United States, the 7 day of July, in the year of Our Lord one thousand nine hundred and twenty-one.

[The Seal of the District Court, East. Dist. Ark., Western Division, U. S. A.]

SID B. REDDING,
Clerk of the District Court of the United States for the Western Division of the Eastern District of Arkansas,
By W. P. FEILD, JR., *D. C.*

Allowed by
E. A. McCULLOCH,
Chief Justice of the Supreme Court of the State of Arkansas.

Filed July 7, 1921.
W. P. SADLER,
Clerk Supreme Court of Arkansas.

40 STATE OF ARKANSAS, *ss:*

Supreme Court.

I, W. P. Sadler, clerk of the said court, do hereby certify that there was lodged with me as such clerk on July 7, 1921, in the matter of St. Louis Cotton Compress Company, versus The State of Arkansas.

1. The original bond of which a copy is herein set forth.

2. Copies of the writ of error, as herein set forth,—one for each defendant, and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Little Rock, Arkansas, this 8th day of July, 1921.

[Seal of the Supreme Court of Arkansas.]

W. P. SADLER,
Clerk Supreme Court of Arkansas.

41 In the Supreme Court of the United States.

ST. LOUIS COTTON COMPRESS COMPANY, Plaintiff in Error,

vs.

STATE OF ARKANSAS, Defendant in Error.

Citation.

To the State of Arkansas, Greeting:

You are hereby notified and admonished to be and appear at the Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to the writ of error filed in the clerk's office of the Supreme Court of the State of Arkansas, wherein the St. Louis Cotton Compress Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected; and why speedy justice should not be done to the party in that behalf.

Witness the Honorable Edgar A. McCulloch, Chief Justice of the Supreme Court of the State of Arkansas, this 7th day of July, 1921.

E. A. McCULLOCH,
Chief Justice of the Supreme Court of the State of Arkansas.

Service of the above citation is acknowledged.

STATE OF ARKANSAS,
By J. S. UTLEY,
Attorney General.

Filed July 7, 1921.
W. P. SADLER,
Clerk.

42 UNITED STATES OF AMERICA:

Supreme Court of Arkansas.

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the seal of the said Supreme Court of Arkansas, in the City of Little Rock, this 8th day of July, 1921.

[Seal of the Supreme Court of Arkansas.]

W. P. SADLER,
Clerk of the Supreme Court of the State of Arkansas.
By —— ——,
Deputy Clerk.

Costs of Suit.

Costs in Circuit Court	$16.05
Costs in Supreme Court	43.35
Costs this transcript pursuant to writ of error	13.50

Paid by Rose, Hemingway, Cantrell & Loughborough.

Endorsed on cover: File No. 28,363. Arkansas Supreme Court. Term No. 408. St. Louis Cotton Compress Company, plaintiff in error, vs. The State of Arkansas. Filed July 12th, 1921. File No. 28,363.

INDEX.

	Page.
Statement	1
Statute assailed	2
Agreed statement of facts	4
Assignment of errors	7
Argument	8

Cases Cited.

Allgeyer v. Louisiana, 165 U. S., 578	9
New York Life Ins. Co. v. Dodge, 246 U. S., 357	23
Same v. Head, 234 U. S., 149	15
Providence Savings Life Ins. Co. v. Kentucky, 239 U. S., 103	20
State Tax on Foreign Held Bonds, 15 Wall., 319	25
Union Transit Co. v. Kentucky, 199 U. S., 194	26
Western Union Tel. Co. v. Kansas, 216 U. S., 216	27, 30
Hyatt v. Blackwell Lumber Co., 31 Idaho, 452	36

IN THE

Supreme Court of the United States

ST. LOUIS COTTON COMPRESS COMPANY, ... *Appellant,*

v. No. 408.

STATE OF ARKANSAS ON THE RELATION OF JOHN D. ARBUCKLE, ATTORNEY GENERAL, ... *Appellee.*

ON WRIT OF ERROR OF THE SUPREME COURT OF THE STATE OF ARKANSAS.

BRIEF FOR APPELLANT.

STATEMENT.

The appellee is a corporation organized under the laws of the State of Missouri, and having its principal place of business in the city of St. Louis, where it is domiciled, but also

having a number of compresses in the State of Arkansas. It effected insurance upon its Arkansas property at St. Louis, in companies doing business there, but not doing business in Arkansas. The premiums were paid in St. Louis, and the policies were payable there in case of loss.

This suit was brought for the purpose of compelling appellant to pay to the State of Arkansas 5 per cent of the gross premiums so paid, the appellee relying upon Section 1 of Act No. 159 of the statutes of Arkansas of 1913, page 676, (*Crawford & Moses Digest*, Sec. 9967), which is as follows:

"*Provided*, that any persons, firm, corporation, individual or association doing business in this State securing indemnity contracts or policy of insurance from any person, firm, corporation, association or individual not authorized to do business in this State, shall, on or before the first day of March each year, file with the Auditor of State a sworn affidavit of the amount of premium paid to such unauthorized persons, firms, associations or cor-

porations, and shall pay into the State treasury a tax of five per centum of the gross premiums paid."

To the complaint, the appellant filed the following answer: (Tr. p 4)

"The insurance taken out by the defendant upon its property in Arkansas was taken out by it at its domicile in the city of St. Louis, State of Missouri, where the policies were contracted for, where they were delivered, where they were paid for, and where they were payable; and said insurance was taken out by the defendants in the State of Missouri, for the reason that the rates of premium charged were 15 per cent lower than were charged by companies authorized to do business in the State of Arkansas. Long before the passage of the statute relied upon herein, the defendant had made large investments in Arkansas in real and personal property essential to the conduct of its business, and which it has held and operated ever since."

The cause was submitted upon the following agreed statement of facts: (Tr. p. 11)

"It is agreed that Bruce T. Bullion is Insurance Commissioner of the State of Arkansas; that the St. Louis Cotton Compress Company is a corporation organized under the laws of the State of Missouri, that its principal place of business is in the City of St. Louis, Missouri; that it is authorized to transact business in the State of Arkansas as a foreign corporation; that it has been doing business in the State of Arkansas since November, 1895; and that prior to the passage of the act under which this suit is brought it had made large investments in real and personal property in the State of Arkansas, and had established a number of cotton compressing plants, which it has been operating ever since; that it conducts a storage business and cotton compressing business in the State of Arkansas at all the places mentioned in the complaint of plaintiff in said State; that none of the Insurance Companies mentioned in Plaintiffs' complaint are authorized to transact business in the State of Arkansas; that the defendant St. Louis Cotton Compress Company at its home office in St. Louis, Missouri, insured all its property located in the state of Arkansas

in the unauthorized insurance companies as alleged by the plaintiffs in their complaint at the time and dates and for the amounts as claimed by plaintiff in the allegations of their complaint; said policies being issued in Missouri and payable there; and that it paid as premiums to the said unauthorized insurance companies in the State of Missouri the amounts as alleged by plaintiffs and at the time which were less than the premiums charged in Arkansas; and the defendant has failed, neglected and refused to make out and deliver and file with the insurance commissioner a sworn affidavit of the amount of premiums paid to unauthorized insurance companies on or before the first day of March of each year, and has failed, neglected and refused to pay into the State Treasury a tax of five per centum on the gross premiums paid to said unauthorized insurance companies as alleged by plaintiffs in their complaint.

"That the amount of 5 per cent tax on the gross premiums paid by defendant to said unauthorized insurance companies for the years 1913 to 1919 inclusive is the sum of Two

Thousand Eight Hundred and Seventy Five ($2,875.00) Dollars, and that said sum of money is wholly unpaid, and that the aggregate amount of interest on the said unpaid taxes is the sum of Eight Hundred and Fifty Nine and 14-100 ($859.14) Dollars, and that the aggregate amount of said unpaid taxes and interest thereon as claimed by the plaintiff, is the sum of Three Thousand Seven Hundred and Thirty Four and 14-100 ($3,734.14) Dollars.

"It is stipulated and agreed between plaintiff and defendant that the foregoing agreed statement of facts may be filed in this cause and used as the evidence in the trial of said cause in the above named Court."

Judgment was entered against the appellant for $3734.14. This was affirmed by the Supreme Court of Arkansas, and from this judgment this writ of error is prosecuted.

That Court held that the act was a valid exercise of the power of the State to admit foreign corporations on any terms that it saw fit. See the opinion, (Tr. p. 7)

ASSIGNMENT OF ERRORS.

1. The Supreme Court of the State of Arkansas erred in not reversing said judgment, because of the error of the Circuit Court of Pulaski County in refusing the declaration of law asked by the petitioner, which was as follows:

"The statute on which this suit is based is void, because it is extra-territorial in its operation and attempts to control the action of parties beyond the borders of the State of Arkansas, and undertakes to deprive the defendant of the freedom of contract in other states, guaranteed to it by the Constitution of the United States, and undertakes to deprive the defendant of its property without due process of law, in violation of the Fourteenth Amendment of said Constitution."

2. The court erred in holding that the provision of Section 1 of Act No. 159 of the Statutes of Arkansas of the year 1913, requiring persons securing policies of insurance outside the State of Arkansas, upon property belonging to them in the State of Arkansas, to pay in to the

State Treasury a tax of five per centum of the gross premiums paid, was a valid enactment, which did not deprive the petitioner of its liberty of contract in other states, and that said statute did not deprive the petitioner of its property without due process of law, in contravention of the Fourteenth Amendment of the Constitution of the United States.

ARGUMENT.

From the foundation of the government, the states have in innumerable instances undertaken to exercise extra-territorial jurisdiction. If they had been permitted to do so, our federation would have been like a congregation of octopuses, each reaching out its tentacles and grappling with the tentacles of the others; and the condition of the citizen, torn by these innumerable and conflicting tentacles, would have been pitiable. From the very beginning, one of the most important functions of this court has been to restrain the state legislatures to action within their own borders, and to prevent their reaching out and interfering with business transacted in other states. A review

of all the decisions in which this court has restricted the state legislatures to their proper jurisdiction would be useless and burdensome; and we shall, therefore, confine ourselves to a few recent cases in which such questions have been considered.

Of course, the leading case on the subject is *Allgeyer* v. *Louisiana*, 165 U. S. 578. There the statute forbade, under penalty, the effecting of marine insurance upon property located in the State of Louisiana, in companies not qualifying to do business in that State. Allegeyer made contracts in New York for blanket insurance upon marine risks, necessitating the giving of notice to the insurance company of the risks that would fall under the policy. Having made the contract in New York, he gave in New Orleans notices of the property to which the policies should attach. He was proceeded against in the State of Louisiana, and the penalty was adjudged against him.

It will be perceived that that case is much stronger than this, because there an essential part of the business was transacted in Louisi-

ana, and Allgeyer was a citizen of that state. The policy, though issued in New York, was not effective until the particular property to which it was to apply, was pointed out to the insurer, and this was done within the limits of the State of Louisiana. Nevertheless, the court held that the statute was void as an attempt to usurp extra-territorial jurisdiction, and to deprive Allgeyer of his constitutional right to contract beyond the borders of the State. In that case the court said (page 585):

"The general contract contained in the open policy, as well as the special insurance upon each shipment of goods of which notice is given to the insurance company, being contracts made in New York and valid there, the State of Louisiana claims notwithstanding such facts that the defendants have violated the act of 1894, by doing an act in that State to effect for themselves insurance on their property then in that State in a marine insurance company which had not complied in all respects with the laws of that State, and that such violation consisted in the act of mailing a letter or sending a telegram to the insurance company in

New York describing the cotton upon which the defendants desired the insurance under the open marine policy to attach. It is claimed on the part of the State that its Legislature had the power to provide that such an act should be illegal and to subject the offender to the penalties provided in the statute. It is said by the Supreme Court that the validity of such a statute has been decided in principle in this court in the case of *Hooper* v. *California*, 155 U. S. 648."

And again, page 589:

"The Supreme Court of Louisiana says that the act of writing within that State, the letter of notification, was an act therein done to effect an insurance on property then in the State, in a marine insurance company which had not complied with its laws, and such act was, therefore, prohibited by the statute. As so construed we think the statute is a violation of the Fourteenth Amendement of the Federal Constitution, in that it deprives the defendants of their liberty without due process of law. The statute which forbids such act does not become due process of law, because it is inconsistent with

the provisions of the Constitution of the Union. The liberty mentioned in that amendment means not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation, and for that purpose to enter into all contracts which may be proper, necessary and essential to his carrying out to a successful conclusion the purpose above mentioned."

And again, page 590:

"Has not a citizen of a State, under the provisions of the Federal Constitution above mentioned, a right to contract outside of the State for insurance on his property—a right of which State legislation can not deprive him? We are not alluding to acts done within the State by an insurance company or its agents doing business therein, which are in violation of the State statute. Such acts come within the prin-

ciple of the Hooper case (supra), and would be controlled by it. When we speak of the liberty to contract for insurance or to do an act to effectuate such a contract already existing, we refer to and have in mind the facts of this case, where the contract was made outside the State, and as such was a valid and proper contract. The act done within the limits of the State under the circumstances of this case and for the purpose therein mentioned, we hold a proper act, one which the defendants were at liberty to perform and which the State Legislature had no right to prevent, at least with reference to the Federal Constitution. To deprive the citizen of such a right as herein described without due process of law is illegal. Such a statute as this in question is not due process of law, because it prohibits an act which under the Federal Constitution the defendants had a right to perform."

And again, page 592:

"The Atlantic Mutual Insurance Company of New York has done no business of insurance within the State of Louisiana and has not sub-

jected itself to any provisions of the statute in question. It had the right to enter into a contract in New York with citizens of Louisiana for the purpose of insuring the property of its citizens, even if that property were in the State of Louisiana, and correlatively the citizens of Louisiana had the right without the State of entering into contract with an insurance company for the same purpose. Any act of the State Legislature which should prevent the entering into such a contract, or the mailing within the State of Louisiana of such a notification as is mentioned in this case, is an improper and illegal interference with the conduct of the citizen although residing in Louisiana, in his right to contract and to carry out the terms of a contract validly entered into outside and beyond the jurisdiction of the State.

"In such a case as the facts here present the policy of the State in forbidding insurance companies which had not complied with the laws of the State from doing business within its limits can not be so carried out as to prevent the citizen from writing such a letter of notification as was written by the plaintiffs in error in the

State of Louisiana, when it is written pursuant to a valid contract made outside the State and with reference to a company which is not doing business within its limits."

It may be said that the Allgeyer case was a criminal proceeding, while the proceeding provided for by our act is of a civil nature. There is, however, no difference of principle between the two. The purpose of each statute was to take from the offending party a sum of money and to transfer it to the State treasury, and the mere form of procedure is unimportant.

In *New York Life Insurance Co.* v. *Head*, 234 U. S. 149, a citizen of New Mexico took out a policy of insurance in the Missouri office of the New York Life Insurance Company. The Missouri laws require that the reserve be kept for the payment of premiums in case of a default in payment by the policy-holder. The latter afterward made an arrangement in New York, by which he borrowed money on the policy, which resulted in its foreclosure. The Supreme Court of Missouri held that the policy, having been taken out in Missouri, the law of

Missouri governed, and the arrangement in New York was void. This court, however, reversed that ruling, holding that the laws of Missouri could have no extra-territorial operation, and saying through Chief Justice White (page 161):

"In other words, concretely speaking we must consider the validity of the loan agreement, that is, how far it was within the power of the State of Missouri to extend its authority into the State of New York and there forbid the parties, one of whom was a citizen of New Mexico and the other a citizen of New York from making such loan agreement in New York simply because it modified a contract originally made in Missouri. Such question, we think, admits of but one answer since it would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that State and in the State of New York, and there destroy freedom of contract, without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the Government under

the Constitution depends. This is so obviously the necessary result of the Constitution that it has rarely been called in question and hence authorities directly dealing with it do not abound. The principle however lies at the foundation of the full faith and credit clause and the many rulings which have given effect to that clause."

And again, page 162:

"It is illustrated as regards the right to freedom of contract by the ruling in *Allgeyer* v. *Louisiana*, 165 U. S. 578, and it finds expression in the decisions of this court affirmatively establishing that a State may not consistently with the due process clause of the Fourteenth Amendment extend its authority beyond its legitimate jurisdiction either by way of the wrongful exertion of judicial power or the unwarranted exercise of the taxing power."

And again, page 163:

"But when this reasoning is analyzed we think it affords no ground whatever for taking this case out of the general rule and making

the distinction relied upon. This is so as the proposition can not be maintained without holding that because a State has power to license a foreign insurance company to do business within its borders and the authority to regulate such business, therefore a State has power to regulate the business of such company outside its borders and which would otherwise be beyond the State's authority; a distinction which brings the contention right back to the primordial conception upon which alone it would be possible to sanction the doctrine contended for, that is, that because a State has power to regulate its domestic concerns, therefore it has the right to control the domestic concerns of other States. It is apparent herefore that to accept the doctrine it would have to be said that the distribution of powers and the limitations which arise from the existence of the Constitution are ephemeral and depend simply upon the willingness of any of the States to exact as a condition of a license granted to a foreign corporation to do business within its borders that the Constitution shall be inapplicable and its limitations worth nothing.

It would go further than this, since it would require it to be decided not only that the constitutional limitations on State powers could be set aside as the result of a license but that the granting of such license could be made the means of extending State power so as to cause it to embrace subjects wholly beyond its legitimate authority.

"It is true it has been held that in view of the power of a State over insurance, it might, as the condition of a license given to a foreign insurance company to do business within its borders, impose a condition as to business within the State, which otherwise but for the complete power to exclude would be held repugnant to the Constitution. In other words that a company having otherwise no right whatever for any purpose to go in without a license would not be heard after accepting the same to complain of exactions upon which the license was conditioned as unconstitutional because of its voluntary submission to the same. But even if it be put out of view that this doctrine has been either expressly or by necessary im-

plication over-ruled or at all events so restricted as to deprive it of all application to this case (see *Harrison* v. *St. L. & San Francisco R. Co.*, 232 U. S. 318, 332, and authorities there cited), it here can have no possible application, since such doctrine at best but recognized the power of a State under the circumstances stated to impose conditions upon the right to do the business embraced by the license, and therefore gives no support to the contention here presented, which is that a State by a license may acquire the right to exert an authority beyond its borders which it can not exercise consistently with the Constitution. But the Constitution and its limitations are the safeguards of all the States, preventing any and all of them under the guise of license or otherwise from exercising powers not possessed."

The case of *Providence Savings Assurance Society* v. *Kentucky*, 239 U. S. 103, is still more conclusive, and, in fact, as conclusive as one case can be of another. The Assurance Society did business in Kentucky, and issued a number of policies. Under the laws of Kentucky, a tax was levied upon the premiums. It

withdrew from the State, and it was contended that the State was entitled to collect the tax upon policies which had been taken out while the company was doing business therein. That is a far stronger case than this, for there the company had submitted itself to the jurisdiction of the State, and had incurred obligations under those conditions. Nevertheless, it was held that when the company withdrew from doing business in the State of Kentucky, the State lost all power to levy taxes upon premiums paid by citizens of Kentucky upon their policies. In that case the court said, speaking through Mr. Justice Hughes:

"It is not controverted that the company, at the time in question, was not soliciting insurance or collecting moneys in that State. Further, it had no offices or agents in Kentucky. Upon the averments which stand admitted in the record it must be assumed that it was not performing any acts within the jurisdiction of Kentucky. It had sought to withdraw itself completely from the State. The conclusion that it continued to do business within the State, notwithstanding this withdrawal, appears

to be based solely upon the fact that it continued to be bound to policy holders residents in Kentucky under policies previously issued in that State and that it received the renewal premiums upon these policies. As the policies remained in force, it is said that the company continued to furnish protection to citizens of Kentucky. The renewal premiums, as already stated, were paid in New York. There is, however, a manifest difficulty in holding that the mere continuance of the obligation of the policies constituted the transaction of a local business for which a privilege tax could be exacted. As a privilege tax, the tax rests upon the assumption that what is done depends upon the State's consent. But the continuance of the contracts of insurance already written by the company was not dependent on the consent of the State. It is true that acts might be done within the State in connection with such policies, as for example in maintaining an office or agents although new insurance was not written or solicited, which could be considered to amount to the continuance of a local business. In such case it would be the actual transaction of busi-

ness that would furnish the ground of the license exaction, and not the mere existence of the obligation under policies previously written. These policies are contracts already made; the State can not destroy them or make their mere continuance, independent of acts within its limits, a privilege to be granted or withheld. Neither the continuance of the obligation in itself, nor acts done elsewhere on account of it, can be regarded as being within the State's control."

The last case in which this court has dealt with the question, so far as we are advised, is *New York Life Insurance Co.* v. *Dodge*, 246 U. S. 357. That case was like the one of New *York Life* v. *Head*, except that the insured was a citizen of Missouri. The Supreme Court of Missouri held that this made a difference, and that the State could control policies of insurance issued within its borders to its own citizens. This court, however, reversed the decision, Mr. Justice McReynolds saying: (page 373)

"In *Allgeyer* v. *Louisiana*, 165 U. S. 578, we held a Louisiana statute invalid which undertook to restrict the right of a citizen while with-

in that State to place insurance upon property located there by contract made and to be performed beyond its borders. We said 'the mere fact that a citizen may be within the limits of a particular State does not prevent his making a contract outside its limits while he himself remains within it,' and ruled that under the Fourteenth Amendment the right to contract outside for insurance on property within a State is one which cannot be taken away by State legislation. So to contract is a part of the liberty guaranteed to every citizen. The doctrine of this case has been often reaffirmed and must be accepted as established."

What is it that is being taxed in this case? It is the money paid in St. Louis by the defendant, domiciled there, to the agent of the insurance company there present, for a policy of insurance there delivered. The money which is taxed is money existing in the State of Missouri, and not in the State of Arkansas. If the fiction that the domicile of the party sought to be taxed draws to it the personal property of the owner be applied, the result is still

the same. The defendant, being a Missouri corporation, its money would be, in that event, all held in that State. In order to sustain this tax, the State of Arkansas must be given the power to reach out beyond its borders and to levy an impost upon property which, so far as the record shows, has never at any time been within its territorial limits. It is evident that, if such a thing could be tolerated, every state would seek to support itself by taxation levied upon persons and corporations living in other states, for transactions there consummated. Our states would be, as we have suggested, merely a lot of squirming, octopuses, with tenacles hopelessly interlaced. It is apparent that if we are to have a perpetual union, such a condition of affairs can not be tolerated.

It would be unduly burdensome to this court to review the many cases in which it has held that no state can impose taxes upon any property not within its borders. As was said by Mr. Justice Field, in the case of the *State Tax on Foreign Held Bonds*, 15 Wallace, 319:

"The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State. These subjects are persons, property, and business. Whatever form taxation may assume, whether as duties, imposts, excises, or licenses, it must relate to one of these subjects. It is not possible to conceive of any other, though as applied to them, the taxation may be exercised in a great variety of ways."

A strong case is that of the *Union Transit Co.* v. *Kentucky*, 199 U. S. 194. In that case the thing sought to be taxed was a franchise granted by the State of Ohio to a ferry company domiciled in Kentucky. The company could not operate without its Ohio franchise, and if there ever was an intangible property, which, in its nature, would pass to a corporation itself and form a part of its assets, at its domicile in an adjacent state, it was this franchise. Yet it was held that it could not be taxed by the State of Kentucky, Mr. Justice Brown saying: (p. 204).

"It is also essential to the validity of a tax that the property shall be within the territorial jurisdiction of the taxing power. Not only is the operation of state laws limited to persons and property within the boundaries of the State, but property which is wholly and exclusively within the jurisdiction of another State, receives none of the protection for which the tax is supposed to be the compensation. This rule receives its most familiar illustration in the cases of land which, to be taxable, must be within the limits of the State. Indeed, we know of no case where a legislature has assumed to impose a tax upon land within the jurisdiction of another State, much less where such action has been defended by any court. It is said by this court in the Foreign-held Bond case, 15 Wall. 300, 319, that no adjudication should be necessary to establish so obvious a proposition as that property lying beyond the jurisdiction of a State is not a subject upon which her taxing power can be legitimately exercised."

And, in *Western Union Telegraph Com-*

pany v. *Kansas,* 216 U. S. 1, it is said on page 38:

" We need not stop to discuss at length the specific question whether the State can by any regulation make the property of the company, outside of Kansas, contribute directly to the support of its schools; such being the effect of the requirement that it pay into the state treasury, for the benefit of the state school fund, a given per cent of all its capital stock as a condition of its doing local business in Kansas. It is firmly estabished that, consistently with the due process clause of the Constitution of the United States, a State cannot tax property located or existing permanently beyond its limits. *Louisville etc.,* v. *Kentucky,* 188 U. S. 385, 398; *Union Transit Co.* v. *Kentucky,* 199 U. S. 194, 209."

Cases of similar import might be cited without number; but these should suffice to illustrate so elementary a principle.

The Supreme Court of Arkansas based its decision upon the ground that the defendant, being a foreign corporation, the state could

impose upon it any terms that it saw fit, as a condition of doing business within its borders. To this there are at least three answers. In the first place, the State can not, in this way, extend its jurisdiction into other states, as abundantly shown in the first four cases cited in this brief. In the second place, the statue in question does not make the payment of the tax a condition of doing business in the State. The act has no more application to a foreign corporation than to any one else. By its terms, it applies to "any person, firm, corporation, individual or association doing business in this State," and no where is there any provision for a forfiture of the right to do business in the State, upon a failure to pay the tax. In the third place, this act was not passed until March 17th, 1913, long after the defendant had been allowed to enter the State of Arkansas, and to invest vast sums of money in the construction of cotton compresses in all the principal towns and cities of that State. The corporation might have been excluded from the State in the first instance, at the whim of its legislature; but when the State of Arkansas permits the corpor-

ation to enter its boundaries, and to make enormous outlays in real property and in the construction of buildings and erection of expensive machinery therein, it is no longer in a position to exclude the defendant from its borders, because the defendant refuses to submit to an unconstitutional exaction.

The law on this subject was so admirably stated by Chief Justice White in the case of the *Western Union Telegraph Co.* v. *Kansas*, page 48, that it is impossible to improve upon his language or the force of his reasoning. He said:

"It is shown that the Telegraph Company, many years ago, went into the State of Kansas, constucted its lines, established its offices, etc., and has since been engaged in business, both interstate and local. It is not disputed that there was no law in the State forbidding the company from doing as it did. From this it results that the corporation went into the State, constructed its plant, and carried on its business, on the implied invitation, or at least with the tacit consent of the State. No one questions

that the tax which is here in dispute, imposed by the law of Kansas upon the corporation, is repugnant to the Costitution of the United States because wanting in due process, and that it is therefore confiscatory in character. The tax being thus conceded to be inherently vicious, there is, of course, no attempt to sustain its validity on its intrinsic merits. The sole contention is that although the tax is void, the Telegraph Company may not invoke the protection of the Constitution of the United States, because it is in a position where it is not entitled to avail itself of the fundamental safeguards which it was the purpose of the Constitution to secure to all. The reasoning by which it is thus sought to sustain the right of the State to exert a power prohibited by the Constitution of the United States, and to outlaw the corporation by depriving it of the protection afforded by that instrument, is this: The State, it is insisted, has the right to prevent a foreign corporation from coming into its jurisdiction and engaging there in local business, and this power, in the nature of things, must include the right to affix such conditions to the privilege of

coming in as the State chooses to impose. Under these circumstances, the argument proceeds, it becomes immaterial to consider the character of the condition annexed by the State to the enjoyment of the right to come in, since, although such conditions be repugnant to the Constitution of the United States and destructive of the most obvious and sacred rights, as the condition only becomes operative provided the corporation elects to come in, therefore the condition is not obligatory but is voluntarily assented to by the corporation and, hence may not be by it questioned. But even if, for the sake of the argument only, the general correctness of the proposition be conceded, it has no application to the case here presented. Such is the case, since this cause is concerned, not with the power of the State to prevent a corporation from coming in for the purpose of doing local business and to attach conditions to the privilege of so coming in, but involves the right of the State to confiscate the property of the corporation already within the State and which has been there for years, devoted to the doing of local business as the result of the im-

plied invitation or tacit consent of the State arising from its failure to forbid or to regulate the coming in. In other words, this case involves determining, not how far a State may arbitrarily exclude, but to what extent, after allowing a corporation to come in and acquire property, a State may take its property within the State without compensation upon the theory that the corporation is not in the State and has no property right therein which is not subject to confiscation. The difference between the premise upon which the proposition contended for rests and the situation here presented seems to me self-evident. I say this because my mind fails to perceive how the doctrine of election or voluntary assumption of an unconstitutional burden can have any possible application to a case like this. Let me illustrate. The Telegraph Company has expended in the State large sums of money, adequate for the purpose of enabling it to do both local and interstate business. The investment is there, and its magnitude, it is fair to assume, is, in part, a resultant of the requirements of the local business. The continued beneficial existance of the in-

vestment depends upon the right to use the property for the purpose for which it was acquired, that is, for both interstate and local business. The state law takes the property, or what is equivalent thereto imposes an unconstitutional and confiscatory burden, upon the condition that such burden be discharged or the local business be abandoned. What possible election can there be? The property is in the State. It has been invested therein for the very purpose of doing local as well as other business. If the unconstitutional burden be not assumed, local business must cease, and hence the property established for the purpose of doing the local business becomes worthless and is in effect confiscated. If, on the other hand, the unconstitutional burden be borne, a like result takes place.

"Nor, I submit, is there force in the suggestion that under the facts here disclosed the company cannot be heard to complain, because, as it was in the State without express authority, it must be assumed to have gone into the State and made its investment subject to the exertion by the State of its authority. I con-

cede the proposition to be sound in so far as it includes the right of the State to exert its lawful powers. That is to say, I concede that the corporation in going in and investing its property within the State did so subject to the right of the State to exert, as to the property thus in the State, all lawful powers which might be called into play as to property so situated, of the character of that under consideration. But I cannot assent to the correctness of the contention in so far as it asserts that the State may suffer a corporation to come into its borders, invest in property therein, and then, after having allowed, by acquiescence or implied invitation, such a situation to arise, the State may treat the corporation as if it had never come in and its property within the State as if it were wholly out of the State, and despoil the corporation of its rights and property upon such false assumption.

" It is to be observed that the view taken by me does not deprive the State of the power to exert its authority over the corporation and its property in the amplest way subject to constitutional limitations. It simply prevents the

State from driving out the corporation which is in the State by imposing upon it arbitrary and unconstitutional conditions, when upon no possible theory could the right to exact them exist, except upon the assumption that the corporation is not in the State, and that the illegal exactions are the price of the privilege of allowing it to come in."

Where this court has spoken so clearly, it would appear unnecessary to refer to the decisions of the state courts; but the case of *Hyatt* v. *Blackwell Lumber Company*, 31 Idaho 452 (173 Pac. 1083) is so exactly in point that we cannot refrain from calling it to the attention of the court. In that case the statute was precisely like the one now before the court, and it was held to be unconstitutional on the authority of *Allgeyer* v. *Louisiana*, 165 U. S. 578, and *New York Life Ins. Co.* v. *Dodge*, 246 U. S. 357.

Respectfully,

WENDELL P. BARKER,
W. E. HEMINGWAY,
GEORGE B. ROSE,
D. H. CANTRELL,
J. F. LOUGHBOROUGH,
For Appellant.

INDEX

	Pages
Statement	3 to 7
Copy of Tax Statute here challenged	7 to 9
Statute is not extra-territorial	9 to 12
Does not deprive of right to contract	12 to 13
Does not deprive of property without due process	13 to 16
Allgeyer vs. Louisiana, 165 U. S., 578, as cited by appellant does not apply	16 to 18
New York Life Ins. Co. vs. Head, 234 U. S., 149, does not apply	18 to 20
Provident Sav. Life Assurance Society vs. Ky., 239 U. S., 103, does not apply	20 to 24
New York Life Ins. Co. vs. Dodge, 246 U. S., 357, does not apply	24 to 27
Tax on Foreign Held Bonds, 15 Wallace, 319, does not apply	27 to 28
Union Transit Co. vs. Ky., 199 U. S., 194, does not apply	28 to 29
Western Union Tel. Co. vs. Kas., 216 U. S., 216, does not apply	29 to 31
Hyatt vs. Blackwell Lbr. Co., 31 Idaho, 452, does not apply	31 to 34
Opinion by Arkansas Supreme Court in this case	34 to 36
The Statute is a revenue measure and lays a Privilege Tax	36 to 51

AUTHORITIES CITED.

State vs. Jones, 91 Ark., 5; McDaniel vs. Hearn, 120 Ark., 288; Leanord vs. State, 95 Ark., 381; Hooper vs. California, 155 U. S., 657	11 to 12
Cyc. 25, Vol. 479; Falls vs. Wright, 55 Ark., 562; Rankin vs. Schofield, 81 Ark., 440	14
Pennoyer vs. Neff, 95 U. S., 714; Ballard vs. Hunter, 74 Ark., 174, and 204 U. S., 241; Kentucky Railroad Cases, 115 U. S., 321	15
Mo. Pac. Ry. Co. vs. Humes, 115 U. S., 520; In re Kemler, 136 U. S., 448-9	16

INDEX—Continued

Page

Provident Savings Life Assurance Society vs. Kentucky, 239 U. S., 113 20

New York Life Ins. Co. vs. Dodge, 246 U. S., 376-377 26

Tax on Foreign Held Bonds, 15 Wallace, 319 27

Union Transit Co. vs. Kentucky, 199 U. S., 201-204 29

Bell's Gap Ry. Co. vs. Pennsylvania, 134 U. S., 232; State vs. Sherman, 105, p. 299; Norris vs. City of Lincoln, 142 N. W., 93 36

Dent vs. West Virginia, 129 U. S., 114; Bridge vs. Henderson City, 173 U. S., 592 37

Davidson vs. New Orleans, 96 U. S., 104-5, Sec. 5 Art. 16, Ark. Const.; State vs. Handlin, 100 Ark., 175; St. Louis, Southwestern Ry. Co. vs. State, 106 Ark., 321, and 235 U. S., 350 40

Williams vs. Arkansas, 85 Ark., 470, and 217 U. S., 79; Barber vs. Connally, 113 U. S., 27; Ex Parte Byles, 93 Ark., 612 41

Mer. National Bank vs. Penn., 167 U. S., 461; Gulf, Col. & Santa Fe R. R. Co. vs. Ellis, 165 U. S., 155; Cinn., N. O. & T. P. Ry. vs. Kentucky, 115 U. S., 321 43

Cooley on Taxation, 2 Ed., 5; Clark vs. Kansas City, 176 U. S., 119 45

Williams vs. Arkansas, 85 Ark., 470 and 217, U. S., 79; M. K. & T. P. Ry. vs. May, 194 U. S., 267; Cook vs. Penn, 97 U. S., 571 46

Williams vs. Ark., 85 Ark., 464, and 217 U. S., 79 48

Little Rock vs. Reinman, 107 Ark., 174, and 237 U. S., 171 49

Gulf, Col. & Santa Fe Ry. vs. Ellis, 165 U. S., 150; Sec. 7, Art. 16 Ark. Const.; St. Louis Southwestern Ry. Co. vs. State, 106 Ark., 321, and 235 U. S. 350 50

IN THE

SUPREME COURT OF THE UNITED STATES

ST. LOUIS COTTON COMPRESS CO.....*Appellant*,

v. No. 408.

STATE OF ARKANSAS, ON THE RELATION OF JOHN D. ARBUCKLE, ATTORNEY GENERAL.....*Appellee*.

ON WRIT OF ERROR OF THE SUPREME COURT OF THE STATE OF ARKANSAS.

BRIEF FOR APPELLEE.

STATEMENT.

This suit is founded on Section 9967 of Crawford & Moses' Digest of the State of Arkansas, which provides, among other things, "that any person, firm, corporation, individual or association doing business in this State, securing indemnity contracts or policy of insurance from any person, firm, corporation, asso-

ciation or individual not authorized to do business in this State, shall, on or before the first day of March each year, file with the Auditor of State a sworn affidavit of the amount of premium paid to such unauthorized persons, firms, associations or corporations, and shall pay into the State treasury a tax of five per centum of the gross premium paid."

It will be observed that this statute provides that any corporation doing business in this State, securing contracts of other associations or corporations not authorized to do business in this State, shall file with the Insurance Cmmissioner, by the time prescribed, a sworn affidavit of the amount of the premiums paid to unauthorized associations or corporations, and pay into the State treasury a tax of five per centum on the gross premiums paid.

It is admitted that the appellant is a corporation doing business in this State, and that it has been since prior to the passage of this act. That the appellant took out contracts of insurance at the times and for the amounts and with the companies as alleged in the complaint, that said insurance companies are corporations not authorized to do business in this State, and that the appellant has failed and refused to file with the Insurance Commissioner an affidavit of the amount of premiums paid, and has

failed to pay into the State treasury the five per centum tax as provided by said act. But the appellant seeks to justify its conduct in refusing to comply with the law, because the policies were contracted for, paid for, taken out and delivered and made payable in the State of Missouri, and because the premium charged by said unauthorized company was fifteen per cent cheaper than was charged by authorized companies doing business in the State; further, it had made large investments in real and personal property in the State with which to carry on its business, and which was essential to the proper management of its business; that said investments were made long before the passage of the statute in question.

The appellant is a resident of the State by virtue of the laws of the State, doing business in the State under the protection of the laws of the State, and is therefore amenable to the laws of the State. It is no defense to this action that the contracts were made in the State of Misouri, for the reason that the statute in question does not make any exception or exemption, and does not relieve the appellant of the payment of the taxes because the contract was made in another State.

The act is plain, and simply says that if the appellant is doing business in the State and secures the

contract from a company not authorized to do business in the State, it shall pay the tax.

The Legislature did not intend when it passed this act to provide that the contract shall be made in the State before the one procuring the policy should pay the tax. If it had so intended, it could have easily, and undoubtedly would have provided that all persons securing insurance contracts from unauthorized companies when the contract was made in the State would be liable for tax, and that contracts secured with unauthorized companies that were not made in the State would not be liable for the tax, and are exempted from the provisions of this act.

Every insurance company authorized to do business in this State shall pay a tax of two per centum of the gross premiums.

Crawford & Moses' Digest of Arkansas, Section 9967.

Companies authorized to do business in the State are required to pay a tax of five per centum on premiums paid for reinsurance in unauthorized companies.

Crawford & Moses' Digest of Arkansas, Section 9967.

It will be noticed that authorized companies doing business in this State are treated by this act as citizens of the State and required to pay five per centum tax on reinsurance with unauthorized insurance companies just as the appellant is.

The unauthorized companies being non-residents of the State, can not be reached by the State, and, therefore, escape the payment of the tax on premiums received for business written on property in the State, it would be unjust and unfair to compel authorized companies who maintain their offices and general and local agents in the State at a large expense, and who pay their taxes provided by law as well as the five per centum on premiums paid for reinsurance in unauthorized companies, and then permit the appellant to escape all liability for taxes.

Section 1 of Act 264, approved March 17, 1917, read as follows:

> "Every fire, tornado, or marine insurance company, incorporation or association authorized to do business in this State, shall file with the Auditor or Insurance Commissioner, at the same time with its annual statement, a sworn statement, setting forth the gross amount of premiums received by it from policies covering risks within

this State, and upon all property located in this State during the year ending December 31, preceding, without deducting for commissions, return premiums or considerations paid for reinsurance or any deductions whatever, and shall also therein set forth in separate items return premiums paid for cancellations and authorized reinsurance. After deducting such return premiums and authorized reinsurance shall pay into the State treasury, on or before the first day of March, a tax of two per centum on such gross receipts; and such tax shall be in lieu of all other taxes, State, county or municipal, on such receipts; nor shall any city, town, or municipality impose any license fee or a privilege tax upon any company or any agent of any company for the privilege of transacting such business of insurance. Provided, that any person, firm, corporation, individual or association doing business in this State, securing indemnity contracts or policy of insurance from any person, firm, corporation, or association or individual not authorized to do business in this State, shall, on or before the first day of March each year, file with the Auditor of State a sworn affidavit of the amount of premium paid to such unauthorized persons, firms, associations or corporations, and shall pay into

the State treasury a tax of five per centum of the gross premiums paid; and provided, further, that insurance companies organized under the laws of Arkansas shall not be required to pay the above prescribed tax, except on that portion of their annual premiums paid for reinsurance in unauthorized companies."

Section 9967 of Crawford & Moses' Digest.

ARGUMENT.

It should be observed that only that clause of said section which levies a five per centum tax upon gross premiums paid for insurance upon the property in Arkansas to companies not authorized to do business in that State is here challenged; and that challenge is here rested upon the ground:

1. That the provision is extra-territorial in its operation, attempts to control the action of parties beyond the State's borders, deprives of the freedom of contract in other States, and deprives defendant of property without due process of law within the meaning of the Fourteenth Amendment to the Federal Constitution.

2. Since the challenge to the act is specific and confined to premises above recited, the validity of the act under the State Constitution and other lim-

itations of the Federal Constitution may be fairly presumed to be conceded; and it is incumbent only to meet the specific attack made by the appellant.

IS THE ACT EXTRA-TERRITORIAL?

It applies only to persons, firms, corporations, etc., in this State; but applies to all in the State without discrimination. It relates only to premiums paid for insurance carried with individuals, companies or corporations who are unauthorized to do business in the State, and applies to all unauthorized insurance companies, whether in or out of the State, and without discrimination as to personnel—whether individual, firm, or corporate.

It relates only to premiums for insurance on property in Arkansas.

DOES THE ACT ATTEMPT TO CONTROL THE ACTION OF PARTIES BEYOND THE BORDERS OF THE STATE?

It applies to "any person, firm, corporation, individual, or association doing business in this State in securing indemnity contracts or policy of insurance from any person, firm, corporation, association or individual not authorized to do business in this State;" but is limited to insurance upon property located in this State.

It may be objected that the language of the act in this particular clause does not specifically limit its application to insurance upon property located in Arkansas; but in the first clause of the section it is so limited, and a legislative body is presumed to take cognizance of existing constitutional limitations in the enactment of legislation, and when legislation is being construed by the courts that intent will be presumed which is in harmony with the Constitutions, Federal and State.

"The language of a statute should be fairly and rationally interpreted so as to carry out the legislative intention; and if it is susceptible of two constructions, one of which will lead to an absurdity and the other not, the latter will be adopted."

State vs. Jones, 91 Ark., 5; also

McDaniel vs. Hearn, 120 Ark., 288.

"An intent to give extra-territorial effect to a statute will not be ascribed to the law-makers unless the language employed affords no escape from such construction."

Leanord vs. State, 95 Ark., 381.

"The elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality."

Hooper vs. California, 155 U. S., 657, citing 3 Peters, 443, 12 Peters, 72, 14 Peters, 178, 112 U. S., 261, and 116 U. S., 252.

DOES THE ACT DEPRIVE OF THE FREEDOM TO CONTRACT IN OTHER STATES?

There is no denial of the right to contract either in Arkansas or elsewhere for insurance with unauthorized companies as respects protection of property in Arkansas or elsewhere.

For the purpose of raising revenue and equalizing the burden thereof, a *privilege* tax is laid upon authorized companies for the right of doing business in Arkansas; and since the foreign company is not within the taxing jurisdiction, the act provides that "person, firm, corporation, etc., doing business in this State" shall pay a privilege tax for the right of insuring property located in Arkansas with unauthorized companies.

The tax complained of is not a personal or a property tax, nor a tax upon business; but is a *privilege tax laid* upon the *Arkansas owner* for the *right* (rec-

ognized) of procuring insurance on *property in Arkansas* with *unauthorized companies.*

DOES THE ACT DEPRIVE APPELLANT OF PROPERTY WITHOUT DUE PROCESS OF LAW?

It is admitted that appellant is the owner of sundry properties in Arkansas which are now protected by insurance policies carried thereon by companies who have not qualified to do business in Arkansas; and that this suit is for the recovery of five per centum of the gross premium paid for such insurance.

The right or privilege of contracting for such insurance was exercised in relation to property in Arkansas; and Arkansas courts have jurisdiction of the subject matter, because jurisdiction is determined not by the abstract right, nor the situs or location where the contract under such right is exercised, but by the situs or location of the property or thing to which the right relates.

The tax here sought is not upon the business or contract of insurance, but upon the occupation rights of maintaining property in Arkansas under protection of unauthorized insurance companies.

> "The power to impose privilege and occupation taxes exists independently and concurrently in the State and Federal government, subject to

constitutional restrictions; in the State government subject to the exclusive rights conferred on Congress for regulating interstate commerce, and in the Federal government subject to the prohibition of any interference with internal regulations of the States."

25 Cyc., 479, and many cases there cited.

The subject matter here is an action for recovery of a privilege tax due the State, and courts have jurisdiction.

"Jurisdiction may be defined as the right to adjudicate concerning the subject matter in the given case, to constitute which there are three things essential; the court must have cognizance of the class of cases, the proper parties must be present and the point decided must be within the issue."

Falls vs. Wright, 55 Ark., 562; also

Rankin vs. Schofield, 81 Ark., 440.

Thus we conclude that under the terms of the act the courts are clothed with jurisdiction of the persons, property and subject matter within the purview of the act; and there is no lack of due process.

"Due process of law requires in judicial proceedings a court having jurisdiction over the sub-

ject matter, and also over the person or property to be affected by the judgment."

Pennoyer vs. Neff, 95 U. S., 714.

"Due process of law has never been precisely defined. While its fundamental requirement is opportunity for hearing and defense, the procedure may be adapted to the case; and proceedings in court are not always essential. The laws of a State come under the prohibition of the Fourteenth Amendment only when they infringe some fundamental right."

Ballard vs. Hunter (St. Francis Levee Tax), 74 Ark., 174, and later affirmed in U. S. Supreme Court, 204 U. S., 241.

"A State statute for raising revenue which requires statement to a designated official, and which affords opportunity in a suit at law for collection of a tax to judicially contest the validity of the proceeding, does not deprive of property without due process of law, within the meaning of the Fourteenth Amendment to the Federal Constitution."

Kentucky Railroad Cases (Taxing Statute), 115 U. S., 321.

"A State law which provides for the impartial application of the same means and methods to all constituents of each class, so that the law shall operate equally and uniformly on all persons in similar circumstances, denies to no person affected by it equal protection by the law within the meaning of the Fourteenth Amendment to the Constitution of the United States."

Kentucky Railroad Cases, 115 U. S., 321.

"If the laws enacted by a State be within the sphere of legislative power, and their enforcement be attended with the observance of those general rules which our system of jurisprudence prescribes for the security of private rights, the harshness, injustice and oppressive character of such laws will not invalidate them as affecting life, liberty, or property without due process of law."

Mo. Pac. Ry. Co. vs. Humes, 115 U. S., 520, affirming Mo. Sup. Ct.

See also—

In re Kemler, 136 U. S., 448-9, affirming N. Y. Sup. Ct.

The case of Allgeyer vs. Louisiana, 165 U. S., 578, cited by appellant and relied upon as the leading

case, does not apply to the case at bar for the following reasons:

There, the Louisiana statute prohibited the contracting for insurance upon property in the State for himself or another with any marine insurance company which had not qualified to do business in the State, declared the act a crime and subjected to a fine.

Here, the Arkansas statute recognizes the right to contract for insurance with companies not authorized in the State; but treats such right, when exercised in relation to property in Arkansas as a privilege, and taxes such privilege at the rate of five per centum of the gross premium so paid.

The Louisiana statute sought to prohibit and to highly penalize a fundamental right; and the Arkansas statute recognizes this fundamental right, but seeks to regulate the exercise of same so as to equalize and harmonize the exercise of such right with an important revenue measure which is conceded to be valid and constitutional in its first clause, and unobjectionable, except as here challenged.

In the Louisiana statute the act of contracting for such insurance was prohibited without regard to where committed, and in Allgeyer vs. Louisiana the act complained of was committed beyond the borders of the State; but in the Arkansas statute the right to

contract with an unauthorized company in or out of the State is conceded and recognized, and the State taxes the exercise of such right or privilege when related to property in Arkansas.

In the Louisiana case, the court had jurisdiction of the defendant, because he lived within the borders of the State, but had no jurisdiction of the offense complained of because committed beyond the borders of the State.

In the case at bar, the court had jurisdiction of the defendant, because it is a corporation of Arkansas as well as Missouri, and had jurisdiction of the subject matter because a privilege tax for the exercise of a right relating to property located in Arkansas.

There is a wide margin between the *prohibition* of a right and the taxation and regulation of such right.

The case of New York Life Insurance Company vs. Head, 234 U. S., 149, herein cited and relied upon by appellant, does not apply for the following reasons:

Therein it was sought to construe a contract for insurance as a New York contract and a subsequent contract admitted to have been in New York between Head of New Mexico and an insurance company in New York according to the laws of Missouri because

the application for the insurance was signed and the policy thereon received by Head while temporarily in Missouri, and upon the ground that the loan thereon, though later contracted for in New York, while Head was still a non-resident of Missouri, was controlled solely by the fact that the application had been signed and the policy delivered in Missouri between non-residents of Missouri.

The case at bar is an action to recover from a corporation authorized in Arkansas a privilege tax for the exercise of a conceded right pertaining to property in Arkansas, and here is no attempt to subject a contract entered into in a foreign State to interpretation under Arkansas statute.

There, the subject of litigation was construction of a contract, and the court had jurisdiction of persons, but could have no jurisdiction of the subject matter being construction of a contract entered into beyond the State's borders.

Here, the court has jurisdiction of the defendant as a domesticated corporation of Arkansas, and the court has jurisdiction of the subject matter, a privilege tax, and being action for recovery on the exercise of a right pertaining to property located in Arkansas.

The case of Provident Saving Life Assurance Society vs. Kentucky, 239 U. S., 103, cited by appellant, does not apply for the following reasons:

It was there sought to recover from the Provident Saving Life Assurance Society a license tax of two per centum of the premiums paid to the Postal Life Insurance Company, domiciled in New York and not authorized to do business in Kentucky under a Kentucky statute, 4226 and 4230-A, which provided a license tax of two per centum on premiums paid to companies doing business in the State, but having withdrawn, should continue to pay said two per centum on all annual premiums and renewals—notwithstanding such withdrawal. And the facts as there pleaded disclosed that defendant paid such tax to time of its withdrawal, on January 1, 1907. On such withdrawal it discharged or withdrew all agents, closed all its offices, ceased to solicit insurance, reinsured the Kentucky business or policies in the Postal Life Insurance Company as a corporation of New York, and thereafter all premiums on the Kentucky policies were paid to the Postal Life Insurance Company in New York.

And the effort in that suit was to collect from Provident Life Assurance Society a two per centum tax on the premiums paid to the Postal Life Insur-

ance Company of New York for the years 1907 to 1911, being a period after withdrawal of the defendants from the State of Kentucky.

There, the subject of litigation was collection of a license tax for years when defendant was not licensed, was doing no business and was not in the State of Kentucky, and sought to tax the defendant for business which had been taken over and transacted by a New York corporation which had never qualified in Kentucky.

Here, the subject of litigation is collection of privilege tax from a corporation authorized and transacting business in Arkansas for the recognized right of maintaining insurance upon property in Arkansas with an unauthorized company. And the court, in discussing that case, said:

> "Taxation without jurisdiction has been held to be a violation of the Fourteenth Amendment; and the principle involved applies to the assertion of authority on the part of the State to exact a license tax for the privilege of doing acts which lie beyond the sphere of local control. It follows that the quality of the act with respect to which the State exercises the taxing power must be considered when the constitutional protection against

the transgression of *jurisdictional* limits is invoked."

"It is not controverted that the company, at the time in question, was not soliciting insurance or collecting moneys in that State. Further, it had no offices or agents in Kentucky. Upon the averments which stand in the record it must be assumed that it was not performing any acts within the jurisdiction of Kentucky. It had sought to withdraw itself completely from the State. The conclusion that it continued to do business within the State, notwithstanding this withdrawal, appears to be grounded solely upon the fact that it continued to be bound to policy holders resident in Kentucky under policies previously issued in that State, and that it received the renewal premiums upon these policies. As the policies remained in force, it is said that the company continued to furnish protection to citizens of Kentucky. The renewal premiums, as already stated, were paid in New York. There is, however, a manifest difficulty in holding that the mere continuance of the obligation of the policies constituted the transaction of a local business for which a privilege tax could be exacted."

"As a privilege tax, the tax rests upon the assumption that what is done rests upon the State's consent. But the continuance of the contracts of insurance already written by the company was not dependent on the consent of the State. It is true that acts might be done within the State in connection with such policies (as, for example, in maintaining an office or agents, although new insurance was not written or solic-) ited) which could be considered to amount to the continuance of a local business. In such case it would be the actual transaction of business that would furnish the ground of the license exaction, and not the mere existence of the obligation under policies previously written."

239 U. S., 113.

There, the defendant had withdrawn from the jurisdiction of the taxing power before accrual of the tax sued for.

Here, the defendant is still doing business and maintaining offices and agents within the limits of the taxing power, and is sued for a privilege tax accruing on the exercise of a right pertaining to tangible property located in Arkansas.

The case of New York Life Insurance Company vs. Dodge, 246 U. S., 357, cited by appellant, does not apply for the following reasons:

There, it was sought to construe a policy loan contract made in New York according to certain restrictions of a Missouri statute, and only because the policy on which the loan was granted had been previously applied for and delivered in Missouri. The court there differentiated and pointed out that the insurance contract, having been executed in Missouri, was a Missouri contract; but that a loan thereon subsequently contracted by a written application therefor from a resident of Missouri, and transmitted by mail to the insurance company in New York, where it was received and finally acted upon, was a New York contract and controlled by the law of that State. And in discusing the case, the court further said:

> "Treating the loan to Dodge as made under a New York agreement which Missouri lacked power to control, the question presented becomes similar in principle to the one decided in New York Life Insurance Company vs. Head, 234 U. S., 149. There, suit was instituted in Missouri upon a policy personally applied for and received while in that State by a citizen of New Mexico. Nine years afterward, having duly acquired the

policy in New Mexico, the transferee wrote from there to the insurer in New York and effected a loan under an agreement like the one before us. The State courts held the policy a Missouri contract and the loan agreement as controlled by its non-forfeiture statute.

"Assuming the policy to be a Missouri contract, we declared Missouri without power to extend its authority over citizens of New Mexico and into New York and forbid the later loan agreement there made simply because it modified the first one."

"We said: 'It would be impossible to permit the statute of Missouri to operate beyond the jurisdiction of that State into the State of New York and there destroy the freedom of contract without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority and upon the preservation of which the government, under the Constitution, depends.'"

"Under the laws of New York, where the parties made the loan agreement now before us, it was valid; also it was one which the Missouri Legislature could not destroy, or prevent a citizen within

its borders from making, being beyond them by direct inhibition; and applying the principles accepted and enforced in New York Life Insurance Company vs. Head, we think the necessary conclusion is that such contract could not be indirectly brought into subjection to statutes of the State and rendered ineffective through a license authorizing the insurance company there to do business. As construed and applied by the Springfield Court of Appeals, Section 7897 (Missouri Statutes), transcends the power of the State. To hold otherwise would permit destruction of the right—often of great value—freely to borrow money upon a policy from the issuing company at its home office, and would, moreover, sanction the impairment of that liberty of contract guaranteed to all by the Fourteenth Amendment."

New York Life Insurance Company vs. Dodge,
246 U. S., 376 and 377.

There, as well as in the case of New York Life Insurance Company vs. Head, the subject-matter of the litigation was the construction of a loan contract; and in each case it was held that the contracts being made in New York, were not to be construed by a Missouri statute.

The case at bar is an action for recovering a tax for a privilege exercised in relation to property in Arkansas, and does not in any sense involve the construction of the insurance contracts here pleaded as having been executed in Missouri.

When such contracts are brought before the courts for construction, there can be no question that construction thereof, in the light of these cited cases, will have to conform to the statutes of Missouri, where made, and not under the statutes of Arkansas, where the defendant does business.

The case of Tax on Foreign Held Bonds, 15 Wallace, 319, cited by appellant, does not apply for the following reasons:

There, it was sought to collect from a corporation of Pennsylvania a tax upon the interest paid upon its foreign held bonds; and being a tax upon property located beyond limits of the taxing power, was held extra-territorial. Both the property and its owner were beyond the jurisdiction of the taxing power.

Here, it is sought to tax a privilege pertaining to tangible property; and both the owner and the property insured are within the borders of the taxing power.

The case of Union Transit Company vs. Kentucky, cited by appellant, does not apply for the following reasons:

There, it was sought to tax cars owned by defendant in Milwaukee, Wisconsin, which were there rented to shippers who took possession of them at Milwaukee, Wisconsin, and used them under such rental contract for carriage of freight in the United Stater Canada and Mexico. Kentucky, by decision of her Supreme Court, sought to tax all the two thousand cars owned by the defendant on the ground that the cars or some part of them passed through Kentucky when being used by railroads under rental thereof for carrying freight. The subject of the litigation was a property tax upon property owned and maintained without and beyond the State, and the Supreme Court therein said:

> "In this case the question is directly presented whether a corporation organized under the laws of Kentucky is subject to taxation upon its tangible personal property permanently located in other States, and employed there in the prosecution of its business."

And the court, of course, held:

"It is essential to the validity of a tax that the property shall be within the territorial jurisdiction of the taxing power."

199 U. S., 201 and 204.

No such facts obtain in the case at bar.

The case of Western Union Telegraph Company vs. Kansas, cited by appellant, involved an effort on the part of Kansas to collect from the defendant a graduating franchise tax upon the whole of its capital stock employed in the various States in the conduct of interstate business; and in passing upon the issues there involved the court used the language quoted by appellant, and reaffirmed the principle often announced that a State may not tax property located beyond its boundary.

The fault of the Kansas statute was in levying a franchise tax upon the whole of defendant's capital stock in and out of the State, instead of restricting the same to that proportion employed within the State; and it has since been uniformly held that a franchise tax based on capital employed in the State is legitimate.

The tax is here sought from a defendant in the State for the exercise of a privilege pertaining to property located in the State.

The defendant, St. Louis Cotton Compress Company, is a foreign corporation in the sense that it is chartered elsewhere; but is domesticated in the sense that it is authorized to do business in the State, maintains offices and agents in the State and owns tangible property in the State.

Under the taxing act here involved, the State, as a revenue measure, in the first clause of Section 1 thereof, seeks to tax "every fire, tornado, or marine insurance" company two per centum of premiums received in Arkansas for the privilege of doing business in the State, and to protect such authorized companies and the public, as well as for revenue purposes, seeks in second clause of Section 1 of the act to tax any "person, firm, corporation, individual or association doing business in the State five per centum on premiums paid to persons, firms, corporations or associations not authorized to do business in this State." And in third clause of said section the State taxes authorized companies five per centum of premiums paid for reinsurance in unauthorized companies; for insurance upon property in Arkansas; and the tax is here sought under Clause 2 of said section from the defendants doing business in Arkansas for the privilege of maintaining insurance on its property located in Arkansas with unauthorized companies.

The case of Hyatt vs. Blackwell Lumber Company, 31 Idaho, 452, last cited by appellant, does not apply for the following reasons:

The Idaho statute in question singled out foreign-written insurance, or insurance in unauthorized companies, and sought to tax premiums paid therefor ten per centum without regard to where the insured lived; and the Arkansas statute here in question, as a revenue measure, lays a tax upon authorized insurance companies; and to equalize the burden thereof it likewise lays a tax upon the Arkansas owner of Arkansas property for privilege of maintaining insurance in unauthorized companies.

The Idaho statute there in question lays the tax upon all owners, resident and foreign, who procure in unauthorized companies insurance on property in Idaho; but the Arkansas statute here in question is limited to persons, firms, companies and corporations doing business in Arkansas, and who procure in unauthorized companies insurance upon property located in Arkansas.

The Idaho statute was designed to so burden insurance on Idaho property with unauthorized companies as to prohibit same and stifle competition, and to that end levied a tax of ten per centum on premiums so paid and one dollar fee on each policy, and further

provided that a failure to report such unauthorized insurance and pay the tax and fee thereon within twenty days should penalize to an amount equal to the delinquent tax, plus one hundred dollars.

The Arkansas statute does not prohibit or stifle competition, but as a revenue measure, taxes both the authorized and unauthorized insurance as related to Arkansas property; and it is careful to limit the application of same to persons, companies and corporations within the borders of the taxing power. The Arkansas statute does not deny the right to contract for insurance anywhere in authorized or unauthorized companies, nor does it lay such a burden upon unauthorized insurance as to amount to prohibition or denial. For the purpose of equalizing the burden of taxation it says to the individual, company and corporation doing business in Arkansas, You may take insurance upon property in Arkansas with unauthorized insurance companies if you prefer; but you must contribute your share to the support of government. Authorized insurance companies in Arkansas, for the support of government, pay a tax for privilege of writing insurance on property in the State; and if you, doing business in Arkansas, exercise your right to maintain insurance on property in the State in tax free, unauthorized insurance companies, you

shall pay five per centum of premiums so paid, as a tax for the exercise of such privilege; and it says to the authorized insurance company, You shall pay five per centum on premiums paid for reinsurance in unauthorized companies.

The appellants, in support of their contention, cite Allgeyer vs. Louisiana, 165 U. S., 678.

The Louisiana statute prohibits a citizen of the State under penalty from placing his insurance in a company not admitted to do business in the State. It shuts him off and precludes him from contracting in another State for insurance on his property in Louisiana.

The Arkansas statute does not do this. Under it a citizen of Arkansas can place his insurance in an unauthorized company without committing an offense against the State laws, and without subjection to a criminal prosecution.

The Arkansas statute provides that if he does place his insurance in unauthorized companies that he is only required to pay a five per centum tax on the premiums paid.

Authorized companies pay an annual tax to the State on premiums collected by them on business done by them in Arkansas. There is no way of collecting

from unauthorized companies; therefore, the law provides that the insured himself shall pay the tax, and it is just and right, because he aids non-admitted companies to transact business in Arkansas without complying with the laws of Arkansas. The statute under consideration does not require the taxes to be paid by a foreign corporation.

Justice Hart of the Arkansas Supreme Court, who wrote the opinion in this case for the court, has well said:

> "In Allgeyer vs. Louisiana, 165 U. S., 578, a citizen and resident of Louisiana made in New York, with a corporation doing business there, a contract for marine insurance to cover cotton to be purchased and shipped. Allgeyer mailed in Louisiana a letter addressed to New York City, reporting the shipments as required by the contract. Under the Louisiana statute it was a crime for any one to do any act to effect insurance in any marine insurance company which had not established a place of business within the State and appointed an agent upon whom process might be served. The insurance company had not been authorized to do business in Louisiana and did no business there. Allgeyer was convicted of mailing the letter, and the Supreme Court of the United

States held that the statute was unconstitutional as considered by the State court because it denied to citizens of the United States rights guaranteed by the Fourteenth Amendment."

"We do not think that case furnishes any support to the contention of counsel for appellee. The court said that the statute in question was not due process of law because it prohibited an act which, under the Federal Constitution, Allgeyer had a right to perform. The court further said, however, that this did not interfere in any way with the acknowledged right of the State to enact such legislation in the legitimate exercise of its police power as it may seem proper. No attempt is made under the present statute to interfere with the freedom of contract between the appellee and foreign insurance companies which are not carrying on business in this State. Appellee had a perfect right to make the contract of insurance without the State of Arkansas. Its right to do so is not affected or questioned by this decision. The question presented for our determination is whether or not the statute requiring persons, firms, or corporations doing business in this State to pay into the State treasury a tax of five per centum of the gross premiums paid by it to cor-

porations or associations not authorized to do business in this State, is a valid one. Appellee is a foreign corporation, and in any event the statute is valid in so far as it is concerned."

The Act is important to the State as a revenue measure, is laid as a privilege tax upon persons in the State for the exercise of a right relating to tangible property located in the State.

"The provision in Fourteenth Amendment that no State shall deny to any person the equal protection of the laws does not prevent a State from adjusting its taxing system in all reasonable ways or compel the States to adopt an iron rule of equal protection."

Bell's Gap Ry. Co. vs. Pennsylvania, 134 U. S., 232.

"Amendment Fourteen does not prohibit a reasonable classification of persons or things for the purpose of legislation."

State vs. Sherman, 105, p. 299, affirming 18 Wyoming, 169; also

Norris vs. City of Lincoln, 142 N. W., 93, affirming 93 Neb., 568.

"Legislation is not open to the charge of depriving one of his rights or property without due process of law, if it be general in its operation upon the subject to which it relates and is enforceable in the usual modes established in the administration of government with respect to kindred matters; that is, by process and proceedings adapted to the nature of the case, and such is the Act of West Virginia in question."

129 U. S., 114, affirming the Supreme Court of W. Va. sustaining a statute regulating the practice of medicine and licensing thereto.

"The presumption of constitutionality following taxing statutes is stronger than applies to law generally, and only where the taxing system clearly and palpably violates the fundamental law will a taxing statute be held invalid."

Bridge vs. Henderson City, 173 U. S., 592;

And to the same effect:

171 U. S., 404.

174 U. S., 754.

183 U. S., 479.

184 U. S., 540.

In Davidson vs. New Orleans (involving a drainage tax statute), the Supreme Court of the United States laid down this proposition as the law:

> "Whenever, by the laws of a State, or by State authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole State or some more limited portion of the community, and these laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections.
>
> "It may violate some provision of the State Constitution against unequal taxation; but the Federal Constitution imposes no restraint on the States in that regard. If private property be taken for public uses without just compensation, it must be remembered that, when the Fourteenth Amendment was adopted, the provisions on that subject, in immediate juxtaposition in the Fifth Amendment with the one we are construing, was

left out, and this was taken. It may possibly violate some of those principles of general constitutional law, of which we could take jurisdiction if we were sitting in review of a circuit court of the United States, as we were in Loan Association vs. Topeka, 20 Wallace, 655.

"But, however this may be or under whatever clause of the Federal Constitution we may review the case, it is not possible to hold that a party has, without due process of law, been deprived of his property, when as regards the issues affecting it he has, by the laws of the State, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case. This was clearly stated by this court, speaking by the Chief Justice in Kennard vs. Morgan, 92 U. S., 480, and in substance repeated at the present term in McMillan vs. Anderson, 95 U. S., 37."

See—

96 U. S., 104-5.

The tax here resisted is a privilege tax, and is authorized by our Constitution.

"The General Assembly shall have power from time to time to tax hawkers, peddlers, ferries, exhibitions and privileges."

Sec. 5, Art. 16, Arkansas Constitution.

This provision of our Constitution as to privilege tax has been construed by our own Supreme Court as follows:

"Inheritance taxes are not laid upon property, but upon the privilege or right to succession, and are not subject to the same tests as to equality and uniformity."

State vs. Handlin, 100 Ark., 175.

"Franchise tax is a tax on the privilege or right granted by the State."

St. Louis Southwestern Ry. Co. vs. State, 106 Ark., 321, later affirmed by U. S. Supreme Court in 235 U. S., 350.

"The privilege of drumming on premises of common carriers for hotels, eating houses, bath houses, physicians, masseurs, surgeons and medical practitioners may be singled out and denied by Arkansas statute of April 30, 1907, without denying equal protection of the laws to the business and profession therein named. State legislation which, in carrying out a public purpose, is limited in its application, is not a denial of equal protection of the laws within the meaning of the Fourteenth Amendment if within the sphere of its op-

eration it affects alike all persons similarly situated."

Williams vs. Arkansas, 85 Ark., 470, affirmed in 217 U. S., 79; and to the same effect see Barber vs. Connaly, 113 U. S., 27.

"The legislature may impose a privilege tax on certain callings, uses or trades. And a privilege tax is uniform if it bears equally upon all persons belonging to the class upon which it is imposed."

Byles *Ex Parte*, 93 Ark., 612.

"The rule of uniformity in taxation requires uniformity in the rate of taxation and in the mode of assessment. There must be an equality of burden. The uniformity must be co-extensive with the territory to which it applies."

Fletcher vs. Oliver, 25 Ark., 289.

"In determining the propriety of a classification made by the Legislature for the purpose of taxing or regulating privileges or occupations, it is the duty of the courts to uphold the legislative determination unless the classification is clearly unreasonable and arbitrary—the Legislature being primarily the judge as to that."

Ex Parte Byles, 93 Ark., 612.

"The State may distinguish, select and classify objects of legislation, and necessarily this power must have a wide range of discretion."

Mer. Ntl. Bk. vs. Penn., 167 U. S., 461; also

115 U. S., 321.

134 U. S., 594.

165 U. S., 150.

184 U. S., 329.

179 U. S., 279.

185 U. S., 364.

188 U. S., 730.

194 U. S., 621.

196 U. S., 269 and 608.

"And it is enough that there is no discrimination in favor of one as compared with another of the same class."

Gulf, Col. & Santa Fe R. R. vs. Ellis, 165 U. S., 155; also

52 U. S., 377.

101 U. S., 377.

101 U. S., 22.

112 U. S., 27.

134 U. S., 234 and 594.

142 U. S., 339.

"Classification of the subject of taxation is necessary to secure the uniformity and equality of taxation; and the requirements of the Federal Constitution have been fulfilled if the rates, though for separate classes, operate uniformly on each class."

Cinn., N. O. & T. P. Ry. Co. vs. Kentucky, 115 U. S., 321.

The appellant attacks the constitutionality of the act on the theory that it is a tax on business; and, therefore, as applied to a contract of insurance applied for, paid for, delivered and collectible in Missouri, it is extra-territorial, and, therefore, repugnant to Fourteenth Amendment.

Such a contention and construction would perhaps be tenable if the tax were laid upon the foreign unauthorized insurance company instead of the domesticated owner of insured property located in Arkansas, or if the tax were sought to be laid upon the non-resident owner of property located in Arkansas,

when insured in an unauthorized company or contract without the State. Their objection would certainly obtain if the act, as in the Louisiana statute, sought to deny absolutely the right to contract with unauthorized companies, being a denial of interstate commerce and extra-territorial, as held in Allgeyer vs. Louisiana, cited by appellant.

But the State insists that the tax, as laid, is not upon property nor business, but upon the privilege or right of maintaining insurance upon property located in Arkansas with companies not authorized to do business in the State. And it is pointed out:

1. That the right of contract is not denied; but the privilege is regulated and taxed.

2. That every resident and domesticated owner of property thus insured, and none other, is taxed.

3. That the tax relates only to property in Arkansas thus insured, and to none other.

And as thus interpreted there is no repugnance to the Federal Constitution, because no denial of the right to contract and no interference with interstate commerce within the meaning of any provision of the Federal Constitution.

It is in no sense extra-territorial because limited to persons, companies and corporations in Arkansas

for the exercise of a privilege relating to property located in Arkansas—thus subjecting only those persons who are within the bounds of the State to a tax for the exercise of a privilege relating only to property within the State. And in a suit for collection of such tax, there can be no lack of due process within the inhibition of the Federal Constitution, because the State, as the taxing power, has jurisdiction of both the parties and the subject matter.

> "Everything to which legislative power extends may be the subject of taxation, whether it be person, property, possession, franchise, privilege, occupation or right. Nothing but express constitutional limitation upon legislative authority can exclude from the grasp of the taxing power if the Legislature in its discretion shall select it for revenue purposes."
>
> Cooley on Taxation, 2 Ed., 5; also
> Clark vs. Kansas City, 176 U. S., 119.

"When the State Legislature has declared that the policy of the State requires a certain measure, it should not be disturbed by the courts under the Fourteenth Amendment, unless it is clearly seen that the law should be extended to classes untouched."

Williams vs. Arkansas, 85 Ark., 470, affirmed in 217 U. S., 79; also

M. K. & T. Ry. Co. vs. May, 194 U. S., 267.

But the appellant resting on the theory that the tax is laid on business insists that 'tis extra-territorial because the business was transacted in Missouri; and we know no better answer to his theory and contention than the language of the United States Supreme Court when quoting from former decisions its construction of the celebrated "Passenger Cases" from New York and Massachusetts and the Passenger Tax statute of Nevada, it said:

> "In Crandall vs. State of Nevada, 73 U. S., 35, the State had passed a law requiring those in charge of all the stage coaches and railroads doing business in the State to make report of every passenger who passed through the State, or went out of it by their conveyances, and to pay a tax of one dollar for every such passenger. The argument was there urged that the tax was laid on the business of the railroads and stage coach companies; but the court said, as in the 'Passenger Cases,' that it was a tax which must fall upon the passenger and be paid by him for the privilege of riding through the State by the usual vehicles of travel."
>
> Cook vs. Pennsylvania, 97 U. S., 571.

As thus construed, the tax in the Nevada tax case and Passenger Cases was a tax for the privilege of traveling through the taxing locality of Nevada, and as to non-residents of the taxing sovereign they were declared unconstitutional as repugnant to interstate commerce.

But the citation is useful to show that in a well presented and digested series of cases under insistence that the tax was upon the business of the carriers because collected from them, the court held the tax to be upon the passenger for the *privilege of traveling* in the States thus seeking to tax. The taxing acts there involved were extra-territorial when applied to non-residents as well as repugnant to interstate commerce; but the act here involved is neither, because applied only to persons, companies and corporations doing business in Arkansas.

The appellant insists that the tax laid is upon "money paid in St. Louis by the defendant, domiciled there, to the agent of the insurance company there present, for a policy of insurance there delivered. The money which is taxed is money existing in the State of Missouri, and not in the State of Arkansas."

Page 24 of Appellant's Brief.

In reply to this contention, we submit the language of the act itself. It could with equal propriety

be argued that the tax complained of is laid upon the property located in Arkansas thus insured in unauthorized companies. The act is not susceptible of either construction, but may consistently be construed as a privilege tax for exercise of a right pertaining to property in the taxing jurisdiction.

In the enactment of a revenue measure the State may invoke her police power for the purpose of equalizing the burden; and within constitutional limitations may make such regulations and classifications as may be necessary for the public convenience and general prosperity.

> "The exercise of the State's police power is not limited to regulations to promote the public health, morals, or safety, but may be extended to such regulations as will promote public convenience and general prosperity."
>
> Williams vs. State, 85 Ark., 464, later affirmed in 217 U. S., 79.

> "The State may, under its police power, make regulations relative to conducting certain lawful trades and pursuits, unless such regulations are so utterly unreasonable in their nature and purpose as to unnecessarily and arbitrarily interfere with

or destroy property and personal rights without due process of law."

Little Rock vs. Reinman, 107 Ark., and later affirmed in 237 U. S., 171.

"The Fourteenth Amendment to the Constitution does not limit the subject in relation to which the police power of the State may be exercised for the protection of its citizens." 129 U. S., 26, affirming the Iowa Supreme Court, sustaining an Iowa statute subjecting railroads to double value of stock killed where track not fenced, on a failure to pay within thirty days after notice.

"The power of the Legislature in establishing different methods of taxation for different persons and property is that of classification, and such power is recognized on all hands; but the extent of the power depends upon the classification. The right to classify is not the right to act arbitrarily, or to deprive persons of the most fundamental sorts of protection accorded to persons generally. Classification means only the division of persons or property into different classes on some basis or principle that from its own nature, and from the nature of the persons or properties classified, affords a reasonable and just ground

for the different treatment of the different classes."

Gulf, Col. & Santa Fe Ry. vs. Ellis, 165 U. S., 150.

It is argued with apparent earnestness (page 29, Appellant's Brief), that because, as a Missouri corporation, it entered the State for business before the enactment of the tax act complained of, it therefore can not be subjected to the same; but we make reply, that under the inherent powers of government and under our Constitution, the State can never surrender her right to tax corporations.

"The power to tax corporations and corporate property shall not be surrendered or suspended by any contract or grant to which the State may be a party."

Section 7, Article 16, Arkansas Constitution.

"A corporation owes its existence to the State, and the right to enjoy this privilege is a subject of taxation, and there is no constitutional restriction against such a tax on such right."

St. Louis Southwestern Ry. Co. vs. State, 106 Ark., 321, later affirmed in 235 U. S., 350.

The State insists that the tax of this act is a privilege tax, laid in Clauses 1 and 3 of Section 1 of the act upon authorized insurance companies; and for purposes of equity, and since unauthorized companies may not be reached for taxation, the tax here complained of in Clause 2 is laid upon Arkansas owners of Arkansas property for the privilege of maintaining upon Arkansas property insurance with unauthorized companies. That it applies only to persons, companies and corporations doing business in the State for the exercise of a privilege and right pertaining to property located in the State. That it is a necessary revenue measure, conforms to all the tests of a privilege tax, and is not repugnant to Fourteenth Amendment to the Federal Constitution, as alleged, and that it should be sustained.

Respectfully submitted,

J. S. UTLEY,
Attorney General;

ELBERT GODWIN,
Assistant Attorney General;

W. T. HAMMOCK,
Assistant Attorney General.

F. G. LINDSEY,
Counsel for Insurance Commissioner.